United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

462

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Number 23, 276

IN THE MATTER OF

RUFUS JOHNSON

Appellant

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

LAWRENCE H. SCHWARTZ
Legal Aid Agency
310 Sixth Street, N.W.
Washington, D.C. 20001

Patricia M. Wald
Neighborhood Legal Services
Program
416 Fifth Street, N.W.
Washington, D.C. 20001

Woodley B. Osborne
Neighborhood Legal Services
Program
416 Fifth Street, N.W.
Washington, D.C. 20001

Of Counsel:

James H. Cohen
COVINGTON & BURLING
888 16th Street, N.W.
Washington, D.C. 20006

QUESTION PRESENTED

Whether a youth who is charged with committing a criminal offense, the conviction for which may result in a prolonged period of institutional confinement and which, if he were an adult, would constitutionally require proof beyond a reasonable doubt, is deprived of his liberty without due process of law or denied equal protection of the laws when he is convicted of delinquency by a "mere preponderance of evidence?"

This case has been before this Court once before on the petition for allowance of the appeal from the judgment of the District of Columbia Court of Appeals, granted by this Court on October 6, 1969.

I N D E X

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

Miscellaneous (Cont'd.) — Page

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,276

IN THE MATTER OF
RUFUS JOHNSON

Appellant

APPEAL FROM THE DISTRICT OF
COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Rufus Johnson, was charged with assaulting a police officer, 22 D.C.Code, Section 505(a), in a petition filed in the Juvenile Court for the District of Columbia on November 15, 1967. Appellant was found guilty of the charge in the petition in a jury trial on February 12, 1968. On February 12, 1968, appellant was placed on probation. Notice of appeal was filed on February 14, 1968. On June 16, 1969, the District of Columbia Court of Appeals affirmed the judgment of the trial court. Petition for allowance of an

appeal was filed in this Court on June 18, 1969, and said petition was granted on October 6, 1969. The jurisdiction of this Court on appeal is proper under 17 D.C.Code, Sections 101 and 104.

REFERENCES AND RULINGS

1) Ruling by the trial court on the burden of proof made on February 12, 1968, by The Honorable John D. Fauntleroy of the Juvenile Court. Trial transcript, pp. 77, 95, 96, 97.

2) Judgment by the District of Columbia Court of Appeals decided June 16, 1969, in No. 4722, on the burden of proof question is reported in 253 A.2d 462. See page one of the Appendix.

STATEMENT OF THE CASE

Appellant, Rufus Johnson, was convicted of assaulting a police officer in a trial by jury on February 12, 1968, before The Honorable John D. Fauntleroy of the District of Columbia Juvenile Court. Appellant was charged with assaulting Officer L. E. Asburn of the Ninth Precinct of the Metropolitan Police Department.

The facts developed at trial are as follows:

On October 6, 1967, at 5:30 P.M., Stanley Johnson, appellant's brother, was in the Ninth Precinct of the District of Columbia Police Department (Tr. 27). He telephoned appellant and requested that he come to the precinct. Soon after this Stanley Johnson had a conversation in the precinct with Officer Montgomery Gardner (Tr. 4). Ten minutes later Stanley Johnson left the precinct, followed by Officer Gardner who was now dressed in civilian clothes. The two met in front of the precinct on the sidewalk and a conversation ensued (Tr. 28).

As Officer Gardner and Stanley Johnson were speaking, appellant approached the precinct. When he was roughly 30 feet away he saw Officer Gardner knock his brother to the

ground (Tr. 55). He rushed over to Officer Gardner and struck him (Tr. 56). From the door of the Precinct, Officer Ashburn of the Ninth Precinct observed appellant rush up to Officer Gardner. Ashburn who was in police uniform also ran to the sidewalk in front of the precinct, interceded on behalf of Officer Gardner, and confronted appellant (Tr. 18). A struggle ensued in which eight officers became involved (Tr. 22). Appellant and his brother were carried into the precinct and arrested (Tr. 45). Appellant was charged in the Juvenile Court with assaulting Officer Ashburn (Tr. 1).

At trial Officer Gardner testified that Stanley Johnson threatened to beat up any policeman not in uniform (Tr. 70). He further testified that Stanley Johnson had threatened to fight him outside the precinct and that he tripped Stanley Johnson and attempted to apprehend him when he was struck on the head by appellant (Tr. 5). When Officer Ashburn came to his aid Officer Gardner testified that he saw appellant swing at Officer Ashburn (Tr. 72).

Officer Ashburn testified that he was wearing a uniform at the time in question and saw appellant strike Officer Gardner in the head moments after Officer Gardner tripped Stanley Johnson to the ground (Tr. 16). He testified that

he ran over to appellant and grabbed him; he turned around and swung at Officer Ashburn (Tr. 18). Further, Officer Ashburn recalled that they fought for 25 seconds until other officers, as close as Ashburn to the scuffle when it began, came to his assistance to subdue appellant (Tr. 19).

Stanley Johnson testified that Officer Gardner had approached him in the precinct on the day in question and called him a "young punk" (Tr. 27). Furthermore he testified that when he left at 5:45 P.M., Officer Gardner, wearing street clothes, began to intimidate him in front of the police station (Tr. 29). Johnson recalled that he was knocked down and involved in a struggle; that he saw other officers grab appellant by the neck, choking him (Tr. 32).

Edward Roland, a friend of appellant, testified that he walked with him to the precinct. He stated that he saw appellant run over to Officer Gardner, strike him, and be immediately wrestled to the ground (Tr. 42). He testified that there was no time for appellant to have swung at anyone before he was knocked to the ground (Tr. 45). He further stated that appellant did not resist the officers nor hit anyone other than Officer Gardner (Tr. 45).

Appellant testified in his own behalf. He stated that

he and Edward Roland were walking to the Ninth Precinct at about five to six o'clock P.M. when they saw a man knock his brother down (Tr. 54). He ran to his brother's aid and struck his brother's assailant (Tr. 56). He testified that he was immediately grabbed by a number of men, some in uniform, and then was beaten (Tr. 57), then dragged by his feet into the precinct (Tr. 62). He testified that he never struck Officer Ashburn and only acted to defend himself when he was being choked after striking Officer Gardner (Tr. 62), and being knocked to the ground.

At the end of the presentation of evidence counsel for the defense requested the judge to instruct the jury that the Government had the burden to establish guilt beyond a reasonable doubt. The Judge rejected defense counsel's request and instead instructed the jury:

> "You are further instructed that the Respondent is not required to prove that he did not commit the offense with which he is charged; rather, the burden rests upon the government to prove to your satisfaction by the "preponderance of the evidence" that the Respondent committed the offense as alleged in the petition....
>
> The Government has the burden of proving that the Respondent committed the offense as charged. This burden of proof can be

> carried in only one way - by establishing the affirmative of the issue of delinquency by the "preponderance of the evidence". This means that the testimony and other evidence presented by the government must have greater weight than the testimony and evidence introduced on behalf of the Respondent; it must be more convincing than that evidence tending to support the Respondent's side. . . . [I]f you find from all the evidence that Respondent has presented, evidence which exactly counterbalances the evidence presented by the government, then your verdict must be for the Respondent. Thus, for the government to prevail you as jurors must conclude that on the basis of all the evidence, the probability of truth favors the Government in its assertion of Respondent's involvement in the delinquency as charged. In effect, you as reasonable and prudent citizens must be soberly and seriously persuaded by clear and convincing proof that the Respondent committed the offense as alleged." (Tr. 95, 96, 97)

Defense counsel objected to the Court's instruction on burden of proof. The jury found petitioner guilty. Petitioner appealed to the District of Columbia Court of Appeals, which affirmed the trial court, after brief and oral argument, on June 16, 1969. In Re Johnson, 253 A.2d 462 (1969). On October 6, 1969, this Court granted appellant's petition for an allowance of an appeal from the judgment of the District of Columbia Court of Appeals.

SUMMARY OF ARGUMENT

Since the beginnings of our history, the right of an accused person to be found guilty of wrongdoing only if there is no reasonable doubt about his guilt has been considered so fundamental that no jurisdiction has deviated or even tried to deviate from such a standard. On many occasions the Supreme Court of the United States has espoused this standard for both state and federal prosecutions. It has pointed out that the "beyond a reasonable doubt" standard stems from the presumption of innocence itself and is inextricably bound to it. It is also an indispensable companion to the privilege against self incrimination. Neither the presumption of innocence nor the privilege against incrimination can be accomodated under a preponderance of the evidence test, such as is used in deciding civil cases. For an accused who invokes the privilege and refuses to take the stand must inevitably suffer where the evidence on both sides is to be weighed and the decision rendered in favor of the side with the greatest preponderance.

Until the advent of the Juvenile Court movement, children and youths accused of crime enjoyed these same protections, including the right to be found guilty of a law violation

only under a reasonable doubt standard. Many Juvenile Courts, however, abandoned such protections under the guise of calling the delinquency proceedings civil. The Supreme Court in In re Gault, 387 U.S. 1 (1967), however, forcefully insisted that juveniles be accorded due process of law in any proceeding that might result in their loss of liberty. Although that case involved only the rights to notice, advice of counsel, the self incrimination provision, and the right of confrontation in any such proceeding, its implications extend to the burden of proof as well. For it is fundamentally unfair to incarcerate a youth for a period of years on a lesser amount of proof than an adult accused of the same crime. It is moreover a denial of the equal protection of the laws guarantee of the Fifth Amendment, because there is no reasonable justification for making such a differentiation in the standard of proof. None of the alleged flexibility or individualized dispositional powers of the Juvenile Court are affected or impaired by the decision to afford juveniles at the trial of contested cases the reasonable doubt standard of proof. The equal protection violation in denying youths in Juvenile Court such a standard is further compounded by the fact that some youths accused of identical crimes will, under District law, be

waived to the U.S. District Court and tried there under the reasonable doubt standard.

Since the Gault decision, many states have acted to change the burden of proof in juvenile proceedings to accord with the adult standard. The highest Court in Illinois, a majority of the judges on the Nebraska Supreme Court, the Fourth Circuit United States Court of Appeals, and several lower Courts have adopted the reasonable doubt standard in juvenile law violation cases. The two foremost standard setting agencies in the field, the Childrens Bureau of the U.S. Department of Health, Education, and Welfare and the National Conference of Commissioners on Uniform State Laws have accepted this standard in their models for state juvenile codes. The states which have adhered to the civil burden of proof have done so by sharply divided Courts. The legislatures or judicial rule making bodies in Colorado, Maryland, New Jersey, and Washington have enacted the reasonable doubt standard into law. The United States Supreme Court is considering the issue this term.

The jurisdictions which have adopted the reasonable doubt rule for juvenile law violators have recognized that, in reality, there is little if any differences between the effects

of a finding of guilty in a juvenile trial and in adult court. The child may be institutionalized and deprived of his liberty, often for longer periods than the adult accused of the same crime. The stigma which attaches to such an adjudication extends to school, employment, social contacts, and prejudices him just as much. Empirical evidence shows that this is equally true in the District of Columbia where a juvenile record is made known to the army, employment agencies, Civil Service investigators, Job Corps, special youth training programs, and local colleges. The local juvenile institutions in their own regulations recognize they are dealing with youths with "criminal behavior"; they employ solitary confinement and handcuffs when necessary to restrain the young inmates. The institutions are under lock and key much of the time. For all practical purposes and according to the perception of the youthful inmates themselves they are being punished for wrongdoing by imprisonment, in the same manner as their adult counterparts.

A higher burden of proof in the Juvenile Court would help not hinder that beleaguered Court in its operations. For it would allow a desperately understaffed and overcrowded Court to concentrate its resources on the clearcut law violators

rather than dilute them among other children who may not be guilty of wrongdoing at all. The present D.C. Juvenile Court already accords juveniles most of adult criminal due process protections; the civil burden of proof is the last vestige of the myth of a "civil" proceeding to go. Yet it is a decisive determinant in a large number of cases of whether a youth will be found guilty and subjected to the juvenile court-training school regime. The prudent administration of justice as well as the deeper constitutional issues of due process and equal protection militate against bringing into the Juvenile Court, through the law violation route, any youth who has not been found guilty "beyond a reasonable doubt".

ARGUMENT

I. THE JUVENILE'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT ARE VIOLATED BY AN ADJUDICATION OF GUILT IN JUVENILE COURT UNDER A PREPONDERANCE OF EVIDENCE STANDARD OF PROOF.

A. The Reasonable Doubt Standard Has Become an Intrinsic Element of Due Process for a Person Accused of Crime.

Although the reasonable doubt standard of proof in criminal cases was not articulated in its present form until the late eighteenth century, it rapidly became an intrinsic and universally adopted part of our criminal justice system. According to McCormick, Evidence, § 321 (1954 ed.),

> This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.1/

1/ McCormick cites as authority for this statement, Thayer, Preliminary Treatise on Evidence, 558-9 (1898) which in turn quoted passages from Coke's 3d Institute. The first articulation of the standard came in the high

At a very early point in our nation's judicial history we see an unequivocal acceptance of "beyond a reasonable doubt" as the applicable standard of proof in criminal prosecutions. So universal has been its acceptance that not a single case can be found in the law books rejecting that standard. Conversely, since it has never even been challenged, there has been no occasion on the part of our Supreme Court to affirm its necessity as a component of criminal due process.2/

Several decisions of the United States Supreme Court in the nineteenth century do, however, apply and interpret the reasonable doubt standard in both federal and state criminal cases. In Miles v. United States, 103 U.S. 304 (1880), a federal prosecution for bigamy, the Court said, at 312:

1/(cont'd.) treason cases of 1798 in Dublin as reported by McNally, Rules of Evidence on Pleas of the Crown, Dublin, 1802. See also May, Reasonable Doubt in Civil and Criminal Cases, 10 Am. L. Rev. 642, 656-7 (1876).

2/ England, like America, embraced the formula in the nineteenth century and retains it to this day. See Kenney, Outline of Criminal Law, §594 (17th ed. 1958), pp. 478-81.

> The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.3/ (Emphasis supplied)

In Hopt v. Utah, 120 U.S. 430 (1887) at 439-442, the Court reiterated the same standard of reasonable doubt in a review of a territorial prosecution:

> . . . If the evidence produced be of such a convincing character that they [the jurors] would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. . . The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion. 120 U.S. 430 at 44.

In Davis v. U.S., 160 U.S. 469 (1895), the Court laid down the same rule for the federal courts:

> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged. 160 U.S. at 493.

3/ The Court cited several early state court cases applying the reasonable doubt standard.

See also Coffin v. U.S., 156 U.S. 432, 460 (1895); Dunbar v. U.S., 156 U.S. 185, 198-9 (1895); Agnew v. U.S., 165 U.S. 36, 51-2 (1897); Holt v. U.S., 218 U.S. 245 (1910).[4/] More recently in Brinegar v. U.S., 338 U.S. 160 (1949), the Court found:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property. 338 U. S. at 174.

4/ Even in the subsequent case of Leland v. Oregon, 343 U.S. 790 (1952) reh. den. 344 U.S. 848 (1952) where the court found it constitutionally permissible for a state to shift the burden of proof to the defendant on an insanity defense, the Court reiterated that the overall burden of proving guilt beyond a reasonable doubt lay on the prosecution. 343 U.S. 790 at 799. Frankfurter, J., dissenting in that case, said:

> . . .[F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated in criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion--basic in our law and rightly one of

And in Speiser v. Randall, it reiterated:

> In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome.(Cases cited) There is always in litigation a margin of error, representing error in factfinding which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.5/

4/(cont'd.) the boasts of a free society--is a requirement and a safeguard of due process of law in the historic, procedural content of "due process." 343 U.S. 790 at 802-3.

5/ Speiser v. Randall, 357 U.S. 513, 525-26 (1958), reh. den., 358 U.S. 860 (1958). Accord, Lilienthal v. United States, 97 U.S. 237 (1878);Holland v. United States, 348 U.S. 120 (1954); Fleishman v. United States, 339 U.S.349, 363 (1950) Brooks v. United States, 164 F.2d 142 (5th Cir. 1947); Shaw v. United States, 174 Ct. Cl. 899, 357 F.2d 949 (1966); Government of Virgin Islands v. Torres, 161 F. Supp. 699 (D.V.I. 1958). See In Re M, 75 Cal. Rep.1, 450 P. 2d 296, 301 (1969); State v. Arenas, 453 P. 2d 915, 917 (Ore. 1969). The last two cases refused to extend the reasonable doubt standard to juvenile delinquency adjudications. Nonetheless, each assumed that an adult's right to be found guilty by the higher standard is a right which is inherent in the Due Process Clause of both the federal and its own state (Ftn. cont'd.)

In sum, then, the standard of reasonable doubt, while it had not yet been definitively articulated at the founding of our nation, was nevertheless in the process of evolving into a universally-accepted element of common law due process. During the nineteenth century this standard became the universal one both in America and England for determining guilt of accused persons. This is reflected in the many opinions of the Supreme Court cited above. The history of criminal procedure in our country discloses no territory, state, or federal court that has even attempted to change that standard, so embedded is it in our notions of due process for criminal cases.

During this entire period and well into the twentieth century, children over the age of seven

---

5/ (cont'd.) constitutions. See also 2 Inbau, Thompson & Sowle, Cases and Comments on Criminal Justice, 1145 (3d Ed. 1968): "An indispensable element of 'due process' is the requirement that guilt be proved 'beyond a reasonable doubt.'"

were tried and treated as adults. They, too, become the beneficiaries of the evolving doctrine of reasonable doubt.6/

B. The Reasonable Doubt Standard is Inextricably Joined to the Presumption of Innocence and the Privilege Against Self Incrimination.

Very early in our judicial history the Supreme Court recognized the interdependence of the reasonable doubt standard of proof in criminal cases and the presumption of innocence. In Coffin v. United States, 156 U.S. 432 (1895) the Court delineated that relationship, in deciding that a judge in a criminal case must instruct a jury not only according to the reasonable doubt standard of proof, but also on the quantitative weight to be given the presumption of innocence.

6/"But there is no trace of the doctrine [of parens patriae] in the history of criminal jurisprudence. At common law, children under seven were incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults." See In Re Gault, 387 U.S. 1 at 16 (1967)

> The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views and indicates the necessity of enforcing the one in order that the other may continue to exist. Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced the doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested to any one accused of crime. 156 U.S. 432 at 460.

It is, then, the presumption of innocence that may, by itself, supply the evidence from which a reasonable doubt may flow. The presumption of innocence would therefore have to undergo major surgery to survive a preponderance of evidence test. The preponderance test denotes simply a relative superiority of evidence in favor of the party on whom rests the burden of proof. It is generally held that evidence preponderates when it is of "greater weight" or "more convincing" than that offered in opposition.7/

7/ Noel v. United Aircraft Corp., 219 F. Supp(Ftn.cont'd)

A noted text-writer has stated further that the "most acceptable" definition of preponderance of the evidence is "proofs which leads the jury to find that the existence of the contested fact is more probable than its non-existence."8/ However, most jurisdictions, including the District of Columbia, retain as well the concept that evidence should be weighed against that

7/ (cont'd.) 556 (D.C. Del. 1963)("greater weight or more convincing"); United States v. Kansas Gas & Electric Co., 215 F.Supp.532 (D.C. Kan. 1963)("evidence which when considered and compared with that opposed to it...has more convincing force and produces...a belief that such evidence is more likely true than not true."); Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., 152 F.Supp. 903 (S.D. N.Y. 1957)("more likely than not" or"more probable than not"); Christensen v. Iowa State Highway Commission, 252 Ia. 1351 (1961), 110 N.W. 2d 573 ("stronger impression," "more convincing"); Bedard v. LaBier,194 N.Y.S. 2d 216 (Sup.Ct. Clinton Co. 1959); Cook v. Michael, 214 Or. 513,330 P.2d 1026 (1958)("more probably true than false"); Delaware Coach Co. v. Savage, 81 F.Supp. 293 (D.C. Del. 1948)("greater weight"); Asher v. Fox, 134 F.Supp. 27 (D.C. Ky. 1955)("probability of truth"); Teutrine v. Prudential Ins. Co. of America, 331 Ill. App. 107 72 N.E. 2d 444 (1947)(preponderance exists when the weight of the evidence "inclines" in favor of the party having the burden of persuasion); Wyatt v. Queen City Coach Co., 229 N.C. 340,49 S.E. 2d 650 (1948); ("greater weight than that in opposition"); Edwards v. Mazor Masterpieces, Inc., 111 U.S. App. D.C. 202, 295 F. 2d 547(1961) ("reasonable probability").

8/ McCormick, Evidence (1954 Ed.) § 319, p.677 (Ftn. cont'd.)

introduced in opposition to it.9/ The model instruction employed in the District of Columbia is typical:

> Preponderance of the evidence means such evidence as, when weighed against that opposed to it, has the more convincing force. . .To establish by a preponderance of the evidence is to move that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your mind's belief that what is sought to be proved is more likely true than not true.
>
> If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party upon whom the burden of proof on that issue rested.10/

8/ (cont'd)See also Morgan, Presumptions and Burden of Proof, 47 Harv. L. Rev. 59 (1933).

9/ See, e.g., Edgar v. Citraro, 112 Cal. App. 178, 297 P. 654 at 656 (1931) "[B]y a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." And see cases cited in n.7.

10/ D.C. Bar Association, Junior Bar Section, Standardized Jury Instructions for the District of Columbia (Rev. Edition), p. 19.

Thus, in a preponderance of evidence context the presumption of innocence alone could rarely, if ever, save a defendant; whereas in the traditional reasonable doubt context it often could.11/

The most graphic example of how closely the presumption of innocence is tied to the reasonable doubt standard occurs when a defendant exercises his privilege against self incrimination, or the right to remain silent at trial.12/ Consider what would happen

11/ Despite the delineation in Coffin v. United States, there have been many courts and treatises equating the reasonable doubt standard with the presumption of innocence. See 156 U.S. 432 at 458. See e.g. Fleishman v. United States, 339 U.S. 349, 363 (1950) "Respondent does not lose the presumption of innocence that surrounds the defendant in a criminal proceeding. That presumption continues to operate until overcome by proof of guilt beyond a reasonable doubt . . ."

12/ Culombe v. Connecticut, 367 U.S. 568, 571(1961);Griffin v. California,380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n., 378 U.S. 52 at 55 (1964) (The Fifth Amendment reflects "an unwillingness to subject those suspected of crime to the cruel dillemma of self-accusation, perjury or contempt."); 8 Wigmore, Evidence (McNaughton rev., 1961), at 317 (The Fifth Amendment embodies the concept of a "fair state-individual balance by requiring the Government to leave the individual alone until good cause is shown for disturbing him and by requiring the Government in its contest with the individual to shoulder the entire load.").

to a criminal defendant who refused to take the stand. Although theoretically, under the preponderance test, the civil defendant is not required to introduce evidence in order to win his case,13/ it nevertheless seems clear that the preponderance test retains no viability without the balancing aspect. This is borne out by the body of cases which hold that although the number of witnesses on either side does not necessarily decide whether or not a preponderance of the evidence has been established, all other things being equal, i.e., equally credible witnesses and

13/ See McCormick, Evidence (1954 ed.) § 319, p.677; Morgan, supra note 8 at p.66. As a practical matter, situations in which a plaintiff introduces evidence sufficient to go to the jury and the defendant offers no evidence are virtually nonexistent. Consequently, there appear to be no cases in which this situation has been judicially analyzed, with the possible exception of White v. Village of Soda Springs, 46 Id. , 153,266 P. 795 (1928). And in that case, the court, in affirming a judgment for the defendant, construed the defendant's failure to introduce evidence as a demurrer--hardly a desirable posture for the juvenile who wishes to remain silent, since it requires that the evidence be viewed in the light most favorable to the plaintiff.

equally plausible versions offered on both sides, the greater number of witnesses should generally prevail over the lesser number. 14/

If therefore the civil preponderance test rather than a criminal reasonable doubt standard were in effect, the defendant would be pressured against invoking his privilege not to testify. For the Government need only show that it is "more probable" than not that he committed a crime. 15/ The judgment

---

14/ See e.g., Caron v. Franke, 121 F. Supp. 958 (W.D. N.Y. 1954); and see Williams v. Colonial Pipeline Co., 220 Ga. 381, 139 S.E. 2d 308 (Ga. 1964). See also Zurich Ins. Co. v. Oglesby, 217 F. Supp. 180 (W.D. Va. 1963); Georgia Power Co. v. Smith, 94 Ga. 166, 94 S.E. 2d 48 (1956); Greenberg v. Alter Co., 255 Ia. 899, 124 N.W. 2d 276 (1963).

15/ "What those who have laid down the principle that 'preponderance' of the evidence will justify and require a decision confirmable with it, have failed to realize, is that perception of the preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be sufficient to generate even the lowest degree of belief. To detect a preponderance of evidence...is neither to believe...nor to be logically required to believe...It would be fatuous to affirm that a man ought to believe even faintly, everything the evidence for which is, in his opinion stronger than the evidence against it." (Ftn. cont'd.)

of the accused--or of his lawyer--that his cause will not be served by his offering opposing evidence will in almost all cases be overborne by the apparent need to attempt to dilute this probability.

To say to the accused that he may stand mute, while at the same time saying that his guilt need only be shown "more probable" than his innocence is to completely emasculate his right to remain silent. This Hobson's Choice, when it concerns fundamental rights, should not be permitted.

In Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968) a three judge court disallowed a provision in the Federal Juvenile Delinquency Act which required a juvenile to waive a jury trial in return for being prosecuted as a juvenile.

> The alternatives presented exert strong pressure on any juvenile defendant to waive his Sixth Amendment right. Though he may well prefer to have the trier of facts be a jury of twelve, the cost of such an election is very nearly prohibitive.

15/ (cont'd.) Prof. Wm. Trickett, Preponderance of Evidence and Reasonable Doubt, The Forum, Dickinson School of Law, Vol. X, p. 76 (1906) cited in 9 Wigmore, Evidence § 2498 (Supp. 1964).

> In recent years, it has been repeatedly held that procedural alternatives cannot be so structured so as to (1) penalize the assertion of rights guaranteed by the Bill of Rights, or (2) coerce the waiver of those rights.
>
> Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed by choosing to assert it, any waiver may be said to have been extracted in an impermissible manner. 280 F. Supp. 994 at 1000-1.16/

Especially in the case of juveniles would the privilege to remain silent be threatened by a preponderance standard.17/ The Court's caution in Wilson v. United States, 149 U.S. 60 at 66 (1893) is particularly applicable to juveniles:

16/In United States v. Jackson, 390 U.S. 570 (1968) the Supreme Court said that the portion of the Lindberg law which provided that the death penalty could only be imposed by a jury was unconstitutional because it tended to coerce the waiver of the right to jury trial.

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." 390 U.S. 570 at 582.

17/ It is clear that In re Gault, 387 U.S. 1 at 49-50 (1967) bestows a privilege against self-incrimination on the juvenile in full measure: "[J]uvenile proceedings to determine 'delinquency,' must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to (Ftn. cont'd.)

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.

To preserve intact the time honored precepts that an accused is presumed innocent until proven guilty and that an accused has the right to remain silent, the"beyond a reasonable doubt" standard must remain inviolate. See, In re Gault, 387 U.S. 1 at 47.

> It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment...is unequivocal and without exception.18/

17/(cont'd.)juvenile proceedings...For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'. And our Constitution guarantees that no person shall be'compelled' to be a witness against himself when he is threatened with deprivation of his liberty--a command which this court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom."

18/ See. e.g. Billeci v. United States 87 U.S. App.D.C. 274, 184 F. 2d 394 (C.A.D.C. 1950)(defendant entitled to presumption of innocence although he presented no defense).

C. The Supreme Court's Insistence on Due Process For Juveniles Accused of Crime In the Gault Case Requires a Reasonable Doubt Standard of Proof.

In re Gault, 387 U.S. 1 (1967) held unequivocally that juveniles accused of crime must be accorded due process guarantees at the adjudicatory stage.

> We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committee to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process clause has a role to play. 387 U.S. 1 at 13.

Because, however, the Court found due process wanting in Gerald Gault's case from the juvenile court's failure to give adequate notice of the charges, to provide counsel, or to honor the privilege against self-incrimination and the right to confrontation, it had no cause to pass on the proper burden of proof.19/

19/See, however, note 7 in the Gault decision which refers to the Arizona courts standard of "clear and convincing evidence." The Court emphasized that "we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution."

The logic of extending the Gault reasoning to include a criminal burden of proof as part of the due process that must be accorded juveniles is, however, inexorable. This conclusion follows from several premises. First, as we have shown, the reasonable doubt standard is so deeply embedded in our notions of criminal justice as to be unchallengeable.

Secondly, the standard of proof is perhaps the most decisive aspect of a factfinding proceeding.20/ The Supreme Court pointed to this obvious fact in Spesier v. Randall, 357 U.S. 513, 525-6 (1958).

> To experienced lawyers it is commonplace that the outcome of a lawsuit--and hence the vindication of legal rights--depends more often on how the factfinder

20/See, e.g., very early Supreme Court cases construing the scope of the U.S. Constitution's prohibition against ex post facto legislation in Art. 1, §9. Any change in the level of proof required to convict a person of wrongdoing was held to be of the very essence of the criminal justice system and could not be changed retroactively. Calder v. Bull, 3 Dall. 386, 389 (1798); (Justice Chase: "I will state what laws I consider ex post facto laws...Every law that alters the legal rules of evidence, and requires less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws, are manifestly unjust and oppressive"). Duncan v. Missouri, 152 U.S. 377 (1894); Kring v. Missouri, 107 U. S. 221, 250 (1882).

> appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake must be the procedural safeguards surrounding those rights.

The difference in result that may occur from a preponderance of evidence as opposed to a reasonable doubt test in factfinding proceedings has been noted by several judges and commentators in the juvenile as well as the adult field.21/ A classic study in the American Jury (Kalven and Zeisel, 1966) pp. 134-5 showed that in a sample of over 1,000 jury cases, the presiding judges thought that 43% were "close cases," and only 57% were "clear" in warranting acquittal or conviction. Similarly among a smaller sample of juries interviewed, it was found that in only 12% of cases where acquittal ensued and in only 19% where conviction ensued was the jury unanimous on its first vote.(p. 488) Thus it can be

21/ See, e.g., State v. Santana, 444 S.W. 2d 614 at 626 (Tex. Sup.Ct. 1969) (dissent) (Ftn. cont'd.)

seen that in the case of both judges and juries, the level of proof necessary to convict will be decisive in a large percentage of cases. The jury study concluded that:

> It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men to free rather than risk convicting one innocent man. This is, to be sure, an almost heroic commitment to decency.(p. 189.)

And judges in several juvenile cases have also admitted on the record that their verdict would have been different under a reasonable doubt standard of proof. See, e.g., In re Samuel, W 299 N.Y.S.2d 414 at 423, 247 N.E. 2d 253 (1969); In re Bigesby, 202 A. 2d 785 (D.C.C.A. 1964) N.1.

21/(cont'd.) "A jury and a reviewing court perform differently when testing a record under the two rules. Under the preponderance of the evidence standard, a finding may be supportable as tipping the scales even by weak circumstances, so long as the inferential leap is not too great. A search of the record for direct evidence or strong circumstances is the limit of a review. A trial by the reasonable doubt standard compels a conviction of the mind. Here a search of the record of evidence which compels a moral, not an absolute, certainty of the crime is required."

Third, the same rationale which led the Supreme Court in Gault to require other aspects of criminal due process, the right to counsel, to the self-incrimination privilege, to confrontation must surely lead to a "beyond a reasonable doubt" standard as well. For the Court in Gault traced the history of the juvenile court movement to an attempt by reformers to escape the rigors and contamination of the adult penal system for children. "The idea of crime and punishment was to be abandoned" (p. 15). The Court was there to help the child; the proceedings were to be "clinical" not adversary. The Court then proceeded to dissect the claimed benefits to the child from the surrender of adult due process requirements, and found them sadly wanting. The stigma of delinquency, the distinct probability of punishment rather than rehabilitation following adjudication did not warrant such an exchange. Nor did the juvenile benefit sufficiently from the "informal" procedures of the Court; more likely his sense of fairness was likely to be impaired by a shortcutting of due process.

There is absolutely nothing in Gault's underlying analysis of the reasons for applying some critical aspects of adult due process to juvenile proceedings that does not apply equally to the burden of proof. And indeed many state and federal courts have so held since Gault.22/

22/ For pre-Gault holdings requiring a similar standard of proof of law violations for children and adults, see In re James Rich, 86 N.Y.S. 2d 308 (Domestic Relations Court, Children's Div., N.Y. County, (1949); In re Madik, 251 N.Y.S. 765 (Sup. Ct. App. Div. 3d Dept. 1931); People v. Anonymous, A.B.C. and D., 53 Misc. 2d 690, 279, N.Y.S. 2d 540, 543 (Nassau County, 1967), Jones v. Commonwealth, 185 Va. 335, 38 S.E. 2d 444 (1946). Such holdings were predicated on the realistic basis that the child was being tried for a crime. For other illustrations of the fact that courts and legislatures recognize the criminal nature of the act which a youth commits, see, e.g., In re Whittington, 13 Oh. App. 2d 11, 233 N.E. 2d 333, 342 (1967)("Commission of a Crime") D.C. Code §3-120 (1967) (Juvenile Court has jurisdiction over "children under 17 years of age who shall be convicted of petty crimes or misdemeanors which may be punishable with fine or imprisonments.") See also Gault, 387 U.S. at 49-50.

The Illinois Supreme Court in In re Urbasek, 38 Ill. 2d 535, 232 N.E. 2d 716 (Ill. 1967) held the reasonable doubt standard to be mandated by the "transcendent spirit" of Gault.

> While. . .the respondent, . .was denied none of the rights [required, under due process of law, to be applied to juvenile court proceedings after Gault], it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. 232 N.E. 2d at 719.

This was because the juvenile could be subjected to a loss of liberty equal to or even greater than an adult, and must be accorded the same protections as to proof.23/

23/ "Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor or the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." Id. at 719-20. The Illinois Court made clear that adherence to this reasonable doubt standard would not weaken the unique benefits of the Illinois Juvenile Court Act. See In re Smith, 326 P.2d 835 (Okla. Crim. App. 1958), in which the court decided that, for purposes of establishing the requisite(Ftn. cont'd.)

In Nebraska a majority of the judges on the Supreme Court voted to apply the reasonable doubt standard to a juvenile law violator[24] charged with forgery.

23/(cont'd.) burden of proof in a determination of delinquency, a child must be accorded all the safeguards of a criminal trial where an unfavorable determination may result in detention amounting to "grave" consequences. See also People ex rel. Rodello v. District Court, Denver County, 436 P.2d 672-76 (Colo. 1968), in which the court remarked that the application of the reasonable doubt standard would not convert a juvenile proceeding into a criminal one. Cf. Reed v. Duter, No. 17546 (7th Cir. Sept. 18, 1969), 6 Crim. L. 2081. Although the standard of proof was not in issue the court suggested that "under Gault, there can be no constitutionally permissible discrimination between the adult prisoner and the juvenile defendant held in state custody." The Seventh Circuit remarked further that:

> "Gault must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty, all constitutional safeguards of the Fifth and Sixth Amendments to the Constitution of the United States which apply, by operation of the Fourteenth Amendment, in criminal proceedings."

24/DeBacker v. Brainard, 183 Neb. 461, 161 N.W. 2d 508 (1968), prob. juris. noted, 393 U.S. 1076 (1969), appeal dismissed, ___ U.S. ___ (1969) (per curiam, Nov. 12, 1969) noted in 44 St. John's L. Rev. 101 (1967). Under the holding of the court, four judges were of the opinion that the Act requiring proof by a preponderance of the evidence rather than beyond a reasonable doubt was unconstitutional. Since Nebraska's constitution provides (Ftn. cont'd.)

Perhaps no judge has more powerfully characterized the instinctive fairness of applying the adult standard of proof than Judge DeCiantis of the Rhode Island Family Court in the case of In re Rindell, 36 U.S.L.W. 2468 (1968):

> Because the legislature dictates that a child who commits a felony shall be called a delinquent, does not change the nature of the crime. Let's face it, murder is murder; robbery is robbery; they both are criminal offenses, not civil, regardless and independent of the age of the doer. Nothing can change the nature of the act which has been committed.
>
> * * *
>
> I am convinced that unless there is a separation of civil process from criminal process, the system of juvenile methods will remain congested with many theories, philosophies

24/(cont'd.) that no legislative enactment may be held unconstitutional except by a concurrence of five judges, the lower court's finding of delinquency using the lighter standard was affirmed. The Supreme Court dismissed the appeal after having noted probable jurisdiction, on the ground that counsel at oral argument admitted that the burden of proof would have made no difference in the finding of guilt and the challenge to burden of proof was not raised at trial. The Court further noted that probable jurisdiction had been noted in In re Samuel W, 38 U.S.L.W. 3153, raising the burden of proof issue in juvenile courts.(Slip Opinion at 2, Nov. 12, 1969. See also Santana v. State,(Ftn. cont'd.)

and inflated dreams of social-minded reforms, which is detrimental to the juvenile in that it deprives him of his constitutional guarantees and individual liberty. All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally must be applied to a juvenile case, even including that of the right to trial by a jury of his peers, as well as a finding of guilt beyond a reasonable doubt, rather than by a preponderance of the evidence. Then, and only then, will uniformity and due process prevail and the juvenile, the police, the court, and everyone else concerned will know where they are headed."(Emphasis added.)

24/ (cont'd.) 431 S.W. 2d 558 (Tex. Civ. App. 1968) applying the reasonable doubt standard to juveniles. The Texas Supreme Court, however, reversed the lower court, 444 S.W. 2d 614(1949) with an impressive dissent by 3 judges who would have applied the same reasonable doubt standard as the lower courts.

"Criminal cases have required the presumption of innocence as well as the greater measure of proof because the law has learned that one's liberty, reputation, future livelihood, career, or even one's life may depend on the outcome. It is for that reason that one is presumed innocent of crime while a civil litigent is not presumed correct in his claim or defense. See Underhill, Criminal Evidence, 4th Ed. §7 (1935) This rule is obviously based upon broad principles of humanity which forbid the infliction of punishment until the commission of the crime is to a reasonable certainty established.It has received the sanction of the most enlightened juries in all civilized communities and in all ages; and with the increasing regard for human life and individual security, it is quite apparent that the integrity of the rule is in no degree impaired . . . . An adult charged with a

And finally in United States v. Costanzo, 395 F. 2d 441 (4th Cir. 1968) a United States Court of Appeals dealing with federal delinquency proceedings, ruled that:

> Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as criminal. We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. See Gault, 87 S. Ct. 1428. The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult. We see a compelling similarity between the enumerated safeguards

---

24/ (cont'd.) felony. . . must always be presumed innocent of the crime for which he is indicted until his guilt is proven beyond a reasonable doubt. . . Such is the rule in all states of this Union. Few precedents concerning the rule have been written by the United States Supreme Court, which is understandable because of the universality of the principle. . ." 444 S.W. 2d at 626.

due a juvenile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other.

* * *

For nearly two centuries this higher standard of proof required in criminal cases has been recognized as a basic procedural safeguard and has been adopted by virtually every jurisdiction in this country. . .The Supreme Court has termed the Government's obligation to prove every element of the offense beyond a reasonable doubt 'a settled standard of the criminal law.' Holland v. United States, 348 U.S. 121, 138 (1954).

In Brinegar v. United States, 338 U.S. 160, 174 (1949), the Court observed that, 'Guilt in a criminal cause must be proved beyond a reasonable doubt,' and explained that requirement in Speiser v. Randall, 357 U.S. 513, 525-26. It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same. Gault makes it abundantly clear that 'under our Constitution, the condition of being a boy does not justify a kangaroo court.' In re Gault, supra, 287 U.S. at 28.

If we had to decide this case on the standard of proof issue tendered by the

> Government, we would be compelled to reverse, for the diluted measure proposed for juvenile cases is predicated upon a logic the cogency of which has been utterly devastated.(Emphasis added.) (Some citations omitted.) 395 F.2d at 444-5.

Not only the courts but state legislatures and rule-making bodies have, since Gault, adopted a reasonable doubt standard. Maryland, Colorado, New Jersey, and Washington have adopted reasonable doubt standards.[25/] Both the Uniform Juvenile Court Act (1968) § 29, drafted by the National Conference of Commissioners on Uniform State Laws,[26/] and the U.S. Department of Health, Education, and Welfare Legislative Guides for Drafting Family and Juvenile Court Acts §32 (1969) provide for such a standard in law violation cases.[27/]

---

25 Colo. Rev. Stat. 22-3-6 (Supp. 1967); Md. Ann.Code, Art. 26 § 70-18(a) (Cum. Supp. 1969). Rules Governing the Courts of the State of New Jersey, Rule 6:9-1 (1967); Juvenile Court Rule 4.4(b), as adopted by the Washington Judicial Council, effective January 10, 1969.

26/The prefatory note to the Uniform Juvenile Court Act reads: "In both cases [Gault and Kent] the language of the opinions and the implications contained in them go beyond the specific holdings. They indicate that if the departures in juvenile court from criminal procedures are to be justified when delinquent conduct is alleged involving what for an adult would be a criminal act, the juvenile court proceedings and dispositions must be governed in fact by the objectives of treatment and rehabilitation. If the approach is (Ftn. cont'd. and Ftn. 27).

There have of course been other courts (e.g., Ohio, California, Texas) who have refused to extend Gault into the realm of burden of proof.[28] These decisions, usually by closely divided courts, have, by and large, been based on the "civil" nature of juvenile proceedings, and their lack of criminal orientation or stigma. The California Supreme Court's holding in In re M. 75 Cal. Rep. 1, 451 P. 2d 296 (1969)

26/a punitive one, these cases indicate that the procedure must adhere to the constitutional requirements which characterize a criminal proceeding.

The Uniform Juvenile Court Act has been drawn with a view to fully meeting the mandates of these decisions. At the same time, the aim has been to preserve the basic objectives of the juvenile court system and to promote their achievement. In short, the Act provides for judicial intervention, when necessary for the care of deprived children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure."

27/For similar recommendations by commentators, see Antieu, Constitutional Rights in Juvenile Courts, 46 Corn. L. Rev. 387, 412 (1961); 37 U. Cinn. L. Rev. 851 (1968); Dorsen and Rezneck, Gault and Juvenile Law, 1 Family L.Q. No. 4, pp. 25-7 (1967); 20 Syr. L. Rev., 1009 (1969).

28/See, e.g., In re Agler, 19 Ohio St. 2d 70, 249 N.E. 2d 808 ("clear and convincing" test adopted). In note 1, p. 815 the Ohio Court sets forth the tests of juvenile proof in all jurisdictions.

that a 1961 juvenile law specifying the burden of proof as one of preponderance was not "clearly positively and unmistakably" unconstitutional, is typical:

> . . .The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after Gault, as we have seen, juvenile proceedings retain a sui generis character: although certain basic rules of the due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances factors other than 'moral certainty of guilt' come into play: e.g., the advantages of maintaining a non-criminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged--although the very heart of an adult criminal prosecution--may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of youth may well be served by a prompt factual decision at a level short of 'moral certainty.' 450 P. 2d at 302-3.[29]

29/See, however, the ringing dissent of Judge Peters of the California Supreme Court in that case:(Ftn. cont'd.)

The California Court was limited in reviewing the burden of proof standard by the "clearly, positively and unmistakably constitutional" standard. This court is not so limited and can reverse a lower court decision in its supervisory jurisdiction over practice and procedure in District of Columbia Courts and mandate the reasonable doubt standard in juvenile court. Tate v. U.S. 123 U.S. App. D.C. 261, 359 F. 2d 245 (1966). Similarly the Oregon Supreme Court in

29/ "[Gault] stands for the proposition that a minor be afforded the same rights granted a defendant in a criminal case unless there are compelling reasons why such rights should not be granted, and that state decisions and statutes providing to the contrary are violative of the United States Constitution. This fundamental lesson of the Gault decision is disregarded by the majority. Certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature. . .Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation, and, as well, is contrary to the teachings of Gault." 450 P.2d at 309.

State v. Arenas, 453 P. 2d 915 (Ore. 1969) although admitting that an adult's right to be found guilty "beyond a reasonable doubt" was of due process dimensions, nevertheless justified a lower standard for juveniles.30/

A New York case now pending before the U. S. Supreme Court poses the constitutional problem squarely. In In re Samuel W., 299 N.Y. S. 2d 414 247 N.E. 2d 253, (1969) prob.juris noted 38 U.S.L.W. 3153 a divided New York Court of Appeals affirmed the civil standard on juvenile cases, calling the difference between the preponderance and reasonable doubt

---

30/ Justice O'Connell, dissenting in Arenas, noted that:

". . .procedure designed to determine whether a child will be incarcerated is essentially criminal procedure. Since the procedure is criminal in nature there is as much reason to require the proof beyond a reasonable doubt in determining the guilt of a child as there is in determining the guilt of an adult.

* * *

"Although the equal protection clause of the Fourteenth Amendment does not require an across-the-board similarity of criminal procedure for adults and children, that clause does require the child to have the same protection as an adult where the character of the procedure has no relationship to the ends that are served by dealing with a child in accordance with the parens patriae concept. When a child is charged with the commission of an act which is a crime if committed (Ftn. cont'd.).

standards a "tenuous one." It was however accompanied by a perceptive dissent by Judge Fuld..30a/

> There may not be any decision expressly stating that the reasonable doubt standard is an essential aspect of due process in criminal prosecutions. But who could question that it is? That standard has been so deeply imbedded in our law, is so fundamental and universal, that no one would venture in an ordinary criminal case to apply a standard less stringent. It is essential to due process not only because of the deprivation of liberty which could result but also because of the vital part it plays in the entire criminal procedural scheme. For example, the burden of proof is closely related to the privilege against self incrimination--as a device to offset the adverse effect of a defendant's failure to defend himself. It also compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants. Manifestly, a person accused of a crime, whether he be an adult defendant in a criminal case, or a child charged as a delinquent, would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

30/(cont'd.)by an adult, the question of whether the child committed the act must be resolved by the trier of fact before the trial judge takes over and attempts to apply the theories of juvenile rehabilitation. It seems to me that this preliminary question of guilt should be determined by the same test whether the accused is an adult or a child. . .Since the relaxation of the burden of proof subjects the child to the risk (Ftn. cont'd. and Ftn. 30a).

In sum, the extension of Gault to the "reasonable doubt" standard of proof has been adopted by courts or legislatures in the Fourth Circuit, Illinois, (a majority of judges in the Nebraska Supreme Court), Rhode Island, Maryland, New Jersey and Washington, as well as by the standard setting Uniform Juvenile Act and the Childrens' Bureau of the Department of Health, Education, and Welfare. It has been rejected, always by sharply divided courts, in California, Ohio, Texas, and New York. The rejecting courts have relied universally on the reasoning that the rehabilitative purposes of the Juvenile Court justify a lower burden of proof at the fact finding level. The courts and judges in the states according the adult standard to juveniles have, on the other hand, faced realistically the fact that a finding of guilt for a law violation in a juvenile court carries with it just as significant results as conviction in an adult criminal court, and that fundamental fairness will not allow two standards of proof for the same law violation, dependent solely on whether the accused is a man or a boy.

Appellant in this case suggests that the reasoning of this second group of jurists is far more in conformity with the implications of Gault and with facts in the District of Columbia.

30/(cont'd.) of incarceration it becomes an integral part of a criminal procedure which, according to the reasoning of Gault, must operate to protect the child to the same extent as it would an adult." 453 P. 2d 915 at 921.

30a/See also State v. Santana, 444 S.W. 2d 614 (Tex. Sup. Ct. 1969), in which a divided court reversed a lower court holding, 431 S.W. 2d 558 (Tex. Civ. App. 1968) requiring a reasonable doubt standard for juveniles.

D. Fundamental Fairness and Equal Protection of the Laws Mandate That All Juveniles Accused of Crime be Judged by the "Reasonable Doubt" Standard.

Implicit in Gault are notions of both due process and equal protection of the laws. For even if every aspect of the Bill of Rights need not be indiscriminately applied to juveniles,[31] e.g., the right to public trial, those rights that rise to the level of "fundamental fairness" must.[32] And the "reasonable doubt" standard is itself an embodiment of our society's notions of "fundamental fairness." It represents a policy determination that no person shall be declared a legal deviant unless the proof is clearcut and subject to no reasonable doubt. It represents our society's purposeful decision that the individual unfairness of wrongly designating someone a criminal far outweighs the advantages to society or to him of incarcerating him or

---

31/ See, however, Trimble v. Stone, 187 F. Supp. 483, 486 (D.D.C. 1960) "The Bill of Rights applies to every individual within the territorial jurisdiction of the United States, irrespective of age. The Constitution contains no age limits."

32/ See concurring opinion of Harlan, J. in In Re Gault, 387 U.S. 1 at 72.

even rehabilitating him, whatever his inherent antisocial tendencies. This basic social decision must, in all fairness, apply to our young as well as our older citizens.

"Fundamental fairness" also applies because if the reasonable doubt standard is not accorded a juvenile, he stands to lose his privilege against self-incrimination as well, a right specifically given him under Gault. For by availing himself of his privilege to stand mute, the juvenile invites conviction, since he can offer no evidence to weigh in the balancing test under the preponderance standard.

The scope of the equal protection guarantee, as it applies between adults and juveniles, must similarly be determined by reference to the nature of the right being withheld and the reasons why it is being withheld.[33/]

The juvenile court movement was built upon the premise that children are in some respects different from adults

---

33/ The court in United States v. Costanzo, supra, p. ___, alluded to a violation of both due process and equal protection. See also Black, J., concurring in In Re Gault, 387 U.S. 1 at 61; Reed v. Duter, note 23, supra; dissent in State v. Arenas, note 29 supra.

and need to be treated differently in some respects. Gault, however, decided that it is not in the juvenile's best interests to be treated differently in respect to the procedures by which it is determined that he is guilty of wrongdoing. Shortcutting of a juvenile's basic rights to notice, hearing, counsel, and the right against self-incrimination would, according to Gault, be antitherapeutic, no matter how much the young subjects might need rehabilitation, therapy, guidance, etc. The state must not intervene to take custody and to deprive the juvenile of his freedom without according him fundamental due process. Neither the laudable purpose of taking custody -- to give help, not to punish -- nor the urgent need of the juvenile for help should justify departure from traditional protections surrounding a finding of legal guilt.

There is, in short, no reasonable relation between the right to be judged under a reasonable doubt standard and the reason it is withheld, to help the juvenile. The desire to help the law violator can, under our traditions, never justify a lower standard of proof. If so, then a first

offender adult could logically be subjected to a lowered standard of proof merely because, if convicted, he would be given probation or sent to a progressive institution. Or conversely, a hardened offender could be subjected to a lower burden because his past record shows he needs help, regardless of whether he committed the present offense. Similarly, whatever extra advantages are theoretically given a juvenile in the way of confidentiality, or limitation of commitment up to age 21, cannot be ransomed by surrender of as fundamental an advantage as the rigid proof standard of reasonable doubt. There is no reasonable justification for requiring a juvenile to barter away such a right. The greater flexibility of the juvenile court in treating young offenders vis-a-vis publicity, disposition and alternate grounds for taking jurisdiction bears no reasonable relation to the burden of proof in proving law violations. Hence, there can be no sound justification for differentiating between adults and juveniles on the burden of proof and Fifth Amendment equal protection of the laws demands that they be treated equally. Baxstram v. Herald,

383 U.S. 107, 111 (1966). A three-judge court in Nieves v. United States, 280 F. Supp. 996 (S.D.N.Y. 1967) has, in fact, already refused to uphold a required waiver of jury trial by juveniles tried in federal delinquency proceedings on any such "benefit" theory.

"We doubt that erosion of a defendant's fundamental right can be sanctioned under the rubric of a balancing test." 280 F. Supp. 996 at 1002. 34/

34/ On the other hand, there may be instances where a juvenile does not require criminal due process protections when he is taken into custody, i.e., for neglect. Such children are the counterparts of adults taken into custody for compulsory treatment for mental illness, alcoholism, or drug addiction. See 21 D.C. Code 545; 24 D.C. Code 527 (1969 Supp); 24 D.C. Code 607 (1967). The basis of such proceedings are medical or social determinations that the subjects are ill or in danger of injury from themselves or others. There is no factual determination that they have violated any specific law; hence the stigma is not one of criminal conduct. Where, however, the basis of the juvenile proceeding is that the juvenile has violated the law, the proceeding is indistinguishable from an adult criminal trial in purpose and result. Once such a determination is made, however, a later proceeding can be held to determine whether the juvenile is in need of supervision or treatment. A lower standard of proof would be permissible at that stage. See, e.g., Legislative Guides for Family and Juvenile Court Acts, 32(d). In addition to law violators the court has jurisdiction to dispose of juveniles who are abandoned, homeless or neglected, truants, children "beyond control" of their parents, or children found in injurious surroundings. See 11 D.C. Code 1551. A new juvenile code revision now pending before Congress, S.2681, would create a PINS category--Persons In Need of (Ftn.cont'd)

Further problems of equal protection arise from the difference in treatment between juveniles themselves due to the waiver provisions by which the Juvenile Court may transfer certain juveniles to the United States District Court for trial.[35] Juveniles aged sixteen to eighteen accused of felonies and any juvenile accused of a capital crime may be so waived. There he will be given the full panoply of adult criminal rights, including the reasonable doubt standard of guilt. See Kent v. United States, 383 U.S. 541 (1965). As between a waived and a nonwaived juvenile accused of the same crime, then, the difference in the burden of proof violates the equal protection of the laws guarantee of the Fifth Amendment. The state, in effect, is running two criminal

---

34/ (cont'd.) Supervision. In Fiscal 1969, the Court handled 195 truants and 191 "beyond control" cases, as well as 454 dependency cases. Annual Report, p.39. In such cases some authorities recommend a "reasonable doubt" standard. See Legislative Guides for Drafting Family and Juvenile Court Acts, §32 (1969). Others who favor a "reasonable doubt" burden in law violation cases would retain a lower standard of proof in this category of cases. Uniform Juvenile Court Act, § (Commissioners on Uniform State Laws, 1968).

35/ 11 D.C. Code 1553 (1967).

justice track systems for juveniles, with varying degrees of proof necessary for conviction. The juvenile, moreover, is not allowed to choose between them, but has one or the other foisted upon him. Although there might well be a reasonable justification for a state choosing selectively between two rehabilitative systems, adult and juvenile, on the basis of the juvenile's past record, adaptability, potential, etc., there can be none for setting two different standards of proof as to whether or not he committed a crime in the first place.

E. In The District of Columbia The Realities Of The Juvenile Justice System Invalidate The Lower Court's Rationale Refusing a Reasonable Doubt Standard In Juvenile Law Violation Cases.

Appellant, along with the defendants in the two companion cases in this appeal, was denied a reasonable doubt standard by the District of Columbia Court of Appeals.[36/] The D.C. Court of Appeals adhered to its earlier rulings in In Re Wylie, 231 A.2d 81 at 84 (1967) and In Re Bigesby,

36/ See In Re Ellis, 253 A.2d 789 (1969); See also Matter of Wendell Hill, 253 A.2d 791; In Re Bumphus, 254 A.2d 400; In Re Coward, 254 A.2d 730 (1969).

202 A.2d 785 (1964) that:

> It is firmly established in this jurisdiction that when a petition is filed in the Juvenile Court against a child, the child "is not accused of a crime, not tried for a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense."

Even after Gault, the Court in In Re Ellis said:

> "Concededly there are points of similarity between a juvenile proceeding and a criminal trial. Nonetheless, hearings held before the Juvenile Court remain civil in nature and differ significantly from their criminal counterpart. By statute, the records of juvenile cases are not open to public inspection. Hearings are also closed to the public. Furthermore, a child adjudged delinquent is neither deemed nor treated as a criminal. No civil disabilities are imposed upon him and he is not disqualified from civil service. The purpose and rationale behind such safeguards and, indeed, the very procedure governing treatment of such juveniles is the care, needs and protection of the minor and his rehabilitation and restoration to useful citizenship. In Re Elmore, D.C. App. 222 A.2d 255, 257, 259 (1966), reversed and remanded on other grounds, 127 U.S. App. D.C. 176, 382 F.2d 125 (1967). A flexible approach to juvenile proceedings is the best manner in which to achieve these ends. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act."

In Re Ellis, 253 A.2d 789 at 790.

The District of Columbia Court of Appeals' rationale

is basically that juvenile proceedings still retain such an essential distinction from adult criminal trials in purpose and result as to justify the lower standard of proof. Appellant contends that this is not true; that the present proceedings in Juvenile Court are already essentially criminal; that the alleged confidentiality of juvenile records is ephemeral; that a juvenile delinquent is "deemed [and] treated as a criminal"; that for all practical purposes civil disabilities are imposed upon him. And finally that any flexibility that now inheres in the juvenile court's ability to deal with such a youth will in no way be affected, except for the better, by the adoption of the adult standard.

1. Except For Reasonable Doubt, The Present D.C. Juvenile Court Operates Essentially as a Criminal Court at the Adjudication Stage.

The adult burden of proof is virtually the only remaining aspect of criminal due process in the District of Columbia not accorded juveniles in the adjudicative stages of a Juvenile Court proceeding. The juvenile must be told of his right to counsel and given opportunity to elect or

waive counsel prior to interrogation at the time the police apprehend him. In The Matter of Enoch Creek, 243 A.2d 49 (D.C. App. 1968). Even then his confessions may not be admissible. In The Matter of Four Youths, 89 Wash. L. Rptr. 639 (D.C. Juv. Ct. 1961). He also has the right to have counsel present and participating at any lineup under the Supreme Court's ruling in Wade v. United States, 388 U.S. 218 (1968). Evidence obtained in violation of his Fourth Amendment right against unlawful search and seizure may not be used against him in the juvenile trial. Two Brothers and a Case of Liquor, 95 Wash. L. Rptr. (D.C. Juv. Ct. 1967). He has a right to a probable cause hearing if he is being held in custody. Cooley v. Stone, ___ U.S. App. D.C. ___, 414 F.2d 1213 (1969). The petition filed against him must allege the specific crime and D.C. Code section which he is charged with violating. In Re Wylie, 231 A.2d 81 D.C. App. (1967). He must be provided with counsel at trial, In Re Gault, 387 U.S. 1 (1967), and counsel may be compensated for law violation cases under the Criminal Justice Act, 18 U.S.C., §3006A. The juvenile has a

right to a jury trial.[37/] 16 D.C. Code, 2307 (1967). The Jencks Act (18 U.S.C., §3500) entitles him to statements of government witnesses for impeachment at trial. His trial may be severed from companion defendants where a joint trial would be prejudicial. With few exceptions, the same rules of evidence apply in juvenile as in adult trials in the District.

The civil burden of proof remains the last remnant in our Juvenile Court of the fiction that the adjudication is a civil one. It is, moreover, a fiction that none of the three judges of our Juvenile Court apparently feel is worth preserving. See Testimony of Judges Miller and Ketcham before Senate Committee on the District of Columbia, November

---

37/ The National Council of Juvenile Court Judges on p. 8 note 1 of its Amicus Brief in the United States Supreme Court in DeBacker v. Brainard, note 24, supra, declined to argue the burden of proof question. The reasonable doubt standard, however, is just as essential with a judge as with a jury. It is particularly valuable in judge trials as a check on traditionally treatment-oriented juvenile judges, to insure that they do not "overreach" to bring children in the court's jurisdiction. This tendency, particularly on the part of older judges, to neglect a juveniles legal rights in order to treat him, was noted in a national survey of the implementation of the Gault decision's mandates for notice, counsel and the privilege against self-incrimination. Lefstein, Stapleton, Teitelbaum, In Search of Juvenile Justice--Gault and Its Implementation, Law and Society Review 491, 495, 560 (1968). The reasonable doubt standard would act as a buffer against such tendencies.

20, 1969.[38]

The changing of the burden of proof to accord with adult criminal standards will merely complete the D.C. Juvenile Court's evaluation and evince a candid process of recognition that the child deserves to have the facts of his law violation found by the same traditional means as an adult.[39] It will in no way affect the special processes of the juvenile court either before or after that adjudication. One of the judges of the D.C. Juvenile Court has recently pointed out the four unique features of that court: its

---

38/ Chief Judge Miller testified: "Finally, recent Supreme Court andother appellate decisions (and even the thrust of this bill) make the adjudicatory function of a juvenile court practically indistinguishable from that of the adult criminal court. Therefore this may well be the time to reassess whether the juvenile court in delinquency matters (as differentiated from juveniles who are in need of supervision or neglected) should not be a strictly adjudicatory tribunal similar to the adult criminal court." See also Tr. p. 77 for remarks of Judge Fauntleroy in this case.

39/ Cf. Nieves v. United States, 280 F. Supp. at 996 for a similar declaration that federal delinquency proceedings are conducted exactly like adult criminal trials except for grand jury indictment. See also dissenting opinion in Santana v. State, 444 S.W. 2d at 628; In Re Gault, 387 U.S. 1 at 13 also drawsthe sharp distinction between intake, adjudicatory, and disposition stages of a juvenile proceeding. The National Crime Commission Report, Challenge of Crime in a Free Society (1967) p. 87, favors such a distinction.

ability to detain juveniles before trial for their own or the community's sake; its special duties and powers to individualize disposition for each child; and its continuing jurisdiction over children until they reach twenty-one. Remarks of Judge Orman Ketcham before Juvenile Practice Institute, November 22, 1969. None of these unique features are in any way affected by the burden of proof in fact finding. It is, in short, the height of absurdity bordering on hypocrisy to continue to refer to juvenile proceedings in the District of Columbia as civil; and to withhold from juveniles so essential a criminal protection as the reasonable doubt standard.

2. The Confidentiality of Juvenile Records Is An Ephemeral Benefit in the District of Columbia

The D.C. Code provides for confidentiality of juvenile court records from indiscriminate inspection.[40/] The statute itself allows access only to the juvenile, his parents, attorney, institutions or agencies having custody of him, or

---

40/ See Cohen, The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt, 68 Mich. L. Rev. - (1970)

"other interested persons, institutions, or agencies" by order of court. Court rules supplement this by giving access to other District of Columbia courts.[41] In addition, the Board of Commissioners (now Mayor-Commissioner) of the District of Columbia has promulgated regulations which make the police department's use of juvenile offender records subject to the same statutory limitations.[42] The Code also states that a juvenile conviction is not a criminal conviction and does not "operate to impose any of the civil disabilities ordinarily imposed by conviction."[43]

Nevertheless, surveys show that juvenile court records or at least the knowledge that a youth has such a record are available on a widespread scale. The juvenile may be pressured himself by legitimate desires for employment,

---

41/ Juvenile Court Rule 4(c).

42/ Revisions and Adoption by the Board of Commissioners of Recommendations of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia, Nov. 2, 1967. See also 4 D.C. Code 134(a) (1967).

43/ Section 16-2308(d), D.C. Code (1967).

schooling, or military service to ask to waive the confidentiality. For example, the Juvenile Court will release a juvenile record (charges and dispositions) to the military when given a signed authorization by the person whose record is requested.[44] A prospective enlistee may also be asked to sign an oath concerning his juvenile and adult criminal record.[45] Juvenile records may also be disclosed by social work agencies referring people for employment. The offender Rehabilitation Project,[46] Project Crossroads[47]

44/ Interview with Edgar J. Silverman, Director of Social Services, D.C. Juvenile Court, November 5, 1969. Applicants for a license to drive a taxicab in the District of Columbia must list juvenile convictions on the application and sign a waiver form for the juvenile record. Interview with Officer Evans, Hack Inspection Office of the District of Columbia, November 5, 6, 1969.

45/ Interview with Sgt. Sanders, U.S. Army Recruiter, November 4, 1969.

46/ Interview with Miss Donna Rowles, Program Developer, Offender Rehabilitation Division of the Legal Aid Agency of the District of Columbia, November 7, 1969.

47/ Interview with Mr. Daniel Little, Job Developer, Project Crossroads, District of Columbia, November 4, 7, 1969.

and Job Corps[48] feel obligated to disclose a youth's criminal record to a prospective employer in order to place him in a job.[49] Such agencies indicate that disclosure of the juvenile's record makes it difficult to place people with many employers.

Employment investigations can also reveal juvenile records. Although Federal Employment Form (Form 171) does not require a listing of offenses committed before age 18[50] investigations for security clearances often reveal an applicant's juvenile conviction in interviews with friends, neighbors, and school authorities.[51]

The Juvenile Court often releases arrest and disposition information to other government agencies in the Dis-

---

48/ Interview with Miss Susan Best, Job Corps, District of Columbia, November 3, 1969.

49/ Mr. John White of MATESA (Manpower Training and Employment Service Agency, formerly USES) indicated that his agency usually does not inform employers of a person's juvenile arrest or conviction record, although he considers such information in making a job placement interview. November 5, 1969.

50/ Chapter 731, Section 2.5 - 2.6, Federal Personnel Manual.

51/ Interview with Mr. James Evans, Bureau of Training, Civil Service Commission, November 5, 1969.

trict of Columbia. A juvenile's public school, for example, is routinely sent a record of charges and dispositions against a youth.[52] While there is no specific statutory authorization for such disclosure, it is apparently done pursuant to an "ongoing special order" of the Chief Judge of the Court.[53] Juvenile records are freely given to the D. C. Bail Agency, an arm of the adult court which gathers bail information. In practice, if the person does not volunteer his juvenile record, the Bail Agency gets it from the Juvenile Court.[54] Free access to the juvenile records is also given the probation officers of the adult courts in

---

52/ Silverman Interview, supra: Mr. Donald Bennett, Clerk of the Court of theD.C. Juvenile Court indicated that he will disclose a juvenile record to a school only if he "knows the school people and how they will use the information." Interview October 29, 1969.

53/ Silverman Interview, supra: No copy of such a special order however could be obtained.

54/ This material is always used in setting release conditions in the adult court. Interview with Mr. Bruce Beaudin, Director, D.C. Bail Agency, November 4, 1969.

D.C. in preparing pre-sentence reports.[55]

Although the actual impact of such disclosures is difficult to measure qualitatively, it may be safely assumed that mere identification as a juvenile offender will generally have some detrimental effect on the individual whose record is disclosed.[56] For example, a potential Armed Services enlistee with a juvenile conviction must have his application reviewed by a waiver board. Presently, neither the Navy or the Air Force will even process an application requiring waiver of an adult or juvenile conviction record.[57] The Army bars admission of any such person to the officer programs.[58] Advancement and security clearances under Civil Service often include an evaluation of a person's

---

55/ Administrative Office of the United States Courts. "The Pre-sentence Investigative Report" Publication No. 103 Division of Probation, p. 11.

56/ Rowles, Little, Best, Interviews, supra. Appellant has no prior arrests or convictions.

57/ Interviews with Chief Petty Officer Fortier, U.S. Navy and Sgt. Miles, Air Force recruiter, November 4, 1969.

58/ Interview with Sgt. Hughes, and Sgt. Sanders, Army Recruiting Division, Washington, D.C., November 4, 1969. Further note Army Regulations, AR601-270, March 18, 1969.

juvenile conviction record.[59] The Hack Inspection Office considers the juvenile record in processing taxicab license applications.[60] Howard University feels that "parents should be entitled to know what type of children their children are attending school with" and therefore includes a question about juvenile conviction on the admissions application form.[61]

These practical consequences of a juvenile adjudication in the District are of course typical of those found throughout the United States.[62] They serve however to belie

---

59/ James Evans Interview, supra.

60/ Officer Evans Interview, supra.

61/ Interview with Mr. Brown, Director of Admission, Howard University on November 5, 1969.

62/ The National Crime Commission's Reports are replete with discussions of the unfortunate consequences of the stigmatizing process. As the reports of virtually every one of its consultants make clear, it is no well kept secret that juvenile records do become known to those in control of every aspect of a boys life, neighbors, schools, employers, the services, courts and that they not only objectively label him but identify him in his own mind as a deviant. See, e.g., Task Force Report on Juvenile Delinquency and Youth Crime, (1967), p. 9, p. 54, pp. 92-3; 353; 417-19 (hereafter referred to as Task Force Report).

too facile reliance on statutory protections against prejudice from such adjudications.

Over twenty years ago, the Virginia court in the Jones case, supra, faced the reality that:

> "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute say no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune unfortunate moment rear its ugly head to destroy his opportunity for advancement and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man. ... Guilt should be proven by evidence which leaves no reasonable doubt." (Emphasis added). 38 S.E.2d at 447.

And Mr. Justice Musmanno of the Pennsylvania Supreme Court, dissenting in In re Holmes, 379 Pa. 599, 109 A.2d 523, 528-9 (1954) cogently perceived that the

words of the majority opinion denying that any taint of criminality attached to a finding of delinquency:

> " ... are put together so as to form beautiful language, but unfortunately the charitable thought expressed therein does not square with the realities of life. To say that a graduate of a reform school is not to be 'deemed a criminal' is very praiseworthy, but this placid bromide commands no authority in the fiercely competitive fields of everyday life." 63/

63/ "... delinquency carries a stigma quite comparable to that attached to the criminal status. In many cases the adjudication and other related experiences may be a more severe psychic blow to the child than criminal conviction is to the adult." Tappan, Crime, Justice and Correction, 392 (1960). There is now before Congress in S.2601 a proposed revision of 11 D.C. Code 1105-1109 which would specifically allow access to juvenile records to any government prosecutor and any court. If anything, it broadens the class of persons authorized to see the juvenile's records. The government attorney is specifically allowed to "divulge the contents to the extent required in the prosecution of a criminal case" and to "inspect a transcript of the testimony of any witness". Juvenile photographs under the proposal "may be displayed to potential witnesses for identification purposes, in accordance with the standards of fairness applicable to adults". There is also a provision recommended to allow the sealing by the court of the juvenile's records if he passes two years after final discharge and has not been readjudicated. Even then, however, the court may permit others to see them by special

3. A Juvenile Delinquent Is "Deemed [and] Treated" as a Criminal in the District of Columbia.

The core paragraph of the Gault ruling confronted "the reality" that:

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence -- and of limited practical meaning -- that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a great or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. ... Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."

Continued - Footnote 63/
order, and any later adjudication will nullify the sealing. For a discussion of the limited use of such expungement provisions see Task Force Report, supra note 63, p.93 "Expunging records is not the simple operation it may seem."

> In view of this it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'. 64/

64/ See also In re Rindell, 36 U.S.L.W. 2468 (1968). "The individual liberty of a juvenile is restrained once he is committed to an agency or to the training school. He is supervised, guarded, and punished. He has no choice. He must obey the rules and the orders given to him while he is at the training school. He cannot go home at will. He cannot do what he desires. He is a prisoner just as much as the adult in the state's prison. *** "With regard to the argument that confinement of a delinquent is not punishment, the court would like to point out that committing a boy who has been declared a delinquent to the Training School is not trotting him to Sunday School, to a World Series Game, or his favorite swimming hole. Neither is releasing him from a Training School the same as graduating him from a high school or a junior college." See also Kent v. United States, 383 U.S. 541 at 555 (1966) ("studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the protess from the reach of constitutional guarantees applicable to adults"); Task Force Report, pp. 7-9; Report of the President's Commission on Crime in the District of Columbia (1966), pp. 665-76, 686-87, 773.

Although District juveniles probably fare better than most,65/ institutionalization for them is largely penal in character too. The most aggressive may be placed in the security juvenile facility guarded by a double ten foot fence topped with barbed wire. Inside "confinement is strict".66/

In other parts of Children's Center, Cedar Knolls and Maple Glen, "most of [the residents] live in black dormitories devoid of privacy or decoration".

65/ See also James; "We Didn't Give Him Any Help", Christian Science Monitor, March 30 - April 1 (1969) quote Joseph Rowan, Director of the John Howard Association of Illinois, as follows: "If someone suggested that we should treat delinquents like animals, a lot of people would raise their eyebrows. However, that suggestion is not all bad ... In many places throughout the country they have done a better job in meeting the standards for the care and treatment of animals in zoos than we have in the care of children. This includes not only delinquents but dependent and neglected children."

66/ See Lippman, "Laurel Children's Center Seeks Answer", Washington Post, Dec. 30, 1968, p. 6 col. 1. See Childrens Center, Handbook of Center Regulations, December 19, 1967 #402 - "All male delinquents 17 years of age or older who are repeated offenders with low rehabilitative potential, who may be security risks, whose offenses may include homicidal or assaultive behavior or those who seem to have fixed criminal behavior shall normally be placed in the Juvenile Facility".

There are only half days of school up to age 16; vocational shops stand idle for lack of instructors.67/ Inmates wear institutional clothing, counselors carry keys and are warned against leaving any resident "unsupervised at any time", against leaving "medicines, tools drugs or any implements within the reach of residents". They are told to personally "lock and unlock doors, screens and windows ... and keep keys on your persons at all times". Counselors are prohibited from any off duty fraternization with inmates. Religious services are compulsory and the child may not change his religion without permission from the authorities. Visitors are limited to near relatives and at specified times. For disciplinary infractions, children may be put in cottage isolations up to three

---

67/ Lippman, note 66, supra. The Deputy Director of Institutional Services is quoted as saying: "By the time we get them its too late. I don't defend the institution, but its part of society, you can't isolate it ... we can't create a new life cycle for these kids in the 12 months we keep them".

The Children's Center administrator said that the institution's primary function "is to keep them off the streets".

days and in the special security cottage with individual cells for longer periods, and mechanical restraints including handcuffs may be used under certain circumstances.68/ The most troublesome have been transferred to adult prisons.69/ Delinquents have even been the subject of medical experiments at Children's Center.70/

68/ See Children's Center, Handbook of Center Regulations Fifteen Fundamental Rules; #122 (Key Central) #274 (fraternization) #400 (religious services and visitors rules) #411 (clothing issue-inmates may keep one Sunday suit) #412 (seclusion and mechanical restraints) #900 (educational program) #1110 (change of religion).

69/ This was true while the National Training School was in operation. See Eleven Youths Committed in National Training School, 91 Wash. L. Rptr. 3009 (1963). The power to transfer juveniles from Childrens Center to adult prison is also proposed in S.2981, the revision of juvenile procedure now before Congress. Cf In re Gault, 387 US.1 at 50.

70/ Horrock, "Welfare to Control Human Tests", Washington Daily News, June 28, 1968, p. 3; "More Drug Tests on Welfare Youngsters Bared", Id. June 4, 1968.

In light of these facts, it is difficult to label the juvenile institutions in the District more rehabilitative than the adult ones,71/ or to justify a young man's incarceration in one on the basis of a lower order of proof than is required for an adult sentenced to the other.

Even after release, there are institutionalized "criminal" connotations to the juvenile's past adjudication. If he is rearrested for a felony a decision on whether to waive him to the adult court on the new offense will be made in large part on the basis of his old record.72/ Decisions on whether to petition less serious charges and on whether to detain a youth in the Receiving Home

---

71/ Modern adult penal institutions are just as cognizant of their rehabilitative functions as juvenile ones. See, e.g., State v. Arenas, 453 P.2d 915, 918 (Ore. 1969). See also Michael and Weschler, Criminal Law and Its Administration, 17 (1940).

72/ See Uniform Policy Position of the Judges, D.C. Juvenile Court (May 18, 1966). Under the proposed revision of the juvenile waiver provision in S.2869, there would be still other ramifications of a past juvenile adjudication. In the revision, juveniles could be waived to adult court at age 16 even if not accused of a serious crime if they had been previously committed as a delinquent. Among the waiver criteria would be "extent and nature of the child's prior delinquency record".

pending trial will also be made on the basis 73/ of his past record.

For all practical purposes the District of Columbia Juvenile Court defendant is "deemed and treated" as a "criminal". And, perhaps, just as important, studies show he sees himself as a "criminal" and his incarceration as imprisonment.74/

One such study of inmates in a Massachusetts reformatory concluded:75/

73/ Metropolitan Police Department, "General Order #6, Series 1964" June 29, 1964.

74/ See Lipsitt, The Juvenile Offender's Perceptions, 14 Crime and Delinquency, No. 1 (January 1968) p. 49 at 59, ("boy's feelings about his behavior often reflect guilt and punishment"). Wheeler, Controlling Delinquents (1968) at 161-2: "It seems clear, then, that whatever the view of those institutional processes that is promulgated by the spokesman for the juvenile court and juvenile agencies, most youthful offenders enter institutions with a sense that they are deprivational places and that the staff that they will find in them are not there primarily for therapeutic purposes."

75/ Wheeler, supra, note 74 at 182-3.

In their eyes commitment to an institution is punishment for misdeeds. The institutions may not be designed for punishment, but they have that effect. Most of what they have heard about them prior to commitment has been negative, and hardly designed to encourage them in a therapeutic response. Indeed, they are less likely to blame parents and community agencies than the officials are, for they know that they could have acted differently. Having acted as they did, they do not expect to receive therapy and help for their problems. On the contrary, commitment to an institution may help, they feel, for precisely the opposite reason. They learn what an unpleasant, uncomfortable, and lonely place it can be. And if it hurts them, it is because others in society have the same view of it that they do: it is a place to send boys who have done the wrong things, and boys who have done it once may do it again. Its most important effects are due to the general deterrence of confinement, of the reputation it confers on them. ... In other words, the offender's view seems to be derived from the image held by society, or at least that segment of the broader society most familiar to the young perspective from which they view their incarceration.

4. Neither the Public Interest Nor the Juvenile is Served by Bringing Children into the Juvenile System Through a Reduced Standard of Proof

Neither the child, the D.C. Juvenile Court, nor the public is served by bringing into the juvenile justice system any children accused of law violations except those who meet the "reasonable doubt" standard. The resources of the Juvenile Court and of the rehabilitation facilities and personnel in the District of Columbia are now stretched to the breaking point. Children who are adjudicated law violators are not receiving the kind and intensity of treatment they need. Services are diluted among the children who most need them to the point of tokenism. The public interest is better served by giving quality services to those children about whose law violation there is no reasonable doubt. Under the present system they share equally in the inadequate services available with those who, under the adult standard, would not

be in the system at all. As a result, the law violators are not rehabilitated; and the others are embittered. 76/

The D.C. Juvenile Court is suffering from an unprecedented increase in referrals -- 6866 cases in Fiscal 1969.77/ It takes an intolerably long time, up to a year in many cases, to bring a juvenile to trial. A more rigid burden of proof in law violation cases would affect this input by increasing the number of dismissals, decreasing

---

76/ See State v. Santana, 444 S.W.2d at 628 (dissent) "Liberty is our real concern. Perhaps no greater harm could come to Santana than the state's misguided efforts to rehabilitate him, if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic one could have reasoned before Gault that the benefits of treatment accorded a juvenile are so helpful and beneficial to the juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant or by tolerating his self incrimination. The rights which Gault accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different."

77/ The Annual Report of the Juvenile Court for Fiscal 1969, p. 22, at p. 10, the Report points out: " ... the Court is getting further behind in its work. As a consequence, the number of juvenile cases awaiting disposition rose from 3,858 at the end of 1968 to 4,572 at the end of 1969." See also p. 17.

the number of cases originally petitioned, and increasing the number of pleas to reduced charges.78/

The social services of the Juvenile Court (except for intake screening) come into play only after adjudication: to prepare disposition recommendations and to provide supervision for probationers. (Annual Report, p. 7-8). At the end of Fiscal 1969, the Court's social staff of 31 was supervising 1,442 children on probation, and preparing an additional 321 social studies for children adjudicated but not yet disposed of. The average caseload per worker was 57, almost double the recommended standard (Annual Report, p. 18).79/ If the number of juveniles adjudicated were reduced, those pressures on the social staff would also be reduced, allowing more time for each child.

78/ By contrast to the Juvenile Court, jury trials are held in the Court of General Sessions on misdemeanors in 2 months and in the U.S. District Court for felonies in 10 months. Both courts have a reasonable doubt standard.

79/ In 1966 the Report of the President's Commission on Crime in the District of Columbia (hereinafter cited as D.C. Crime Commission Report) showed that "the core of the Juvenile Court's probation treatment program is an office interview of 10 to 15 minutes with the probationer approximately every 3 weeks" (p. 694).

As far as rehabilitative resources for adjudicated law violators committed to custody are concerned, the Court's Annual Report says: "one of the most urgent problems confronting the Court is the limited dispositional resources abailable to it" (p. 19). The court cites totally inadequate resources for drug addicted juveniles, psychiatrically disturbed ones;[30/] it has only one Youth Probation House (capacity 15) for probationers without a suitable home. For those committed to the Department of Public Welfare's Children's Center, the Court cited the following urgent needs:

> "a special home for clearly dependent and non-aggressive children; additional psychiatrists to evaluate and treat emotionally-disturbed children (at present there is only one psychiatrist for the entire population); a much more intensive educational program, regular classes, etc., including a high school program; vocational training in tune with the times, ...

80/ See also Judicial Conference Committee on Laws Pertaining to Mental Disorders, Disposition of Mentally Disordered Juvenile Delinquents in the Juvenile Court of the District of Columbia (1968)p. 10: "Most delinquent juveniles with emotional disturbances or mental disorders are committed to institutions which are primarily guardian in nature and lack facilities for psychiatric care and treatment."

a special vocational training and educational program for girls, ... sex education, family planning, and birth control information." 81/

The D.C. Crime Commission's Report in 1966 showed a 42% recidivism rate in a juvenile sample survey within 6 months from institutional release (p. 709). The Court's most recent figures show 33% of juvenile law violators referred to court have already been adjudicated as delinquent (p. 28). 82/

81/ For a more scathing critique of the District's only commitment facility for delinquent children, see D.C. Crime Commission Report, pp. 700-9. See also testimony of Winifred Thompson, Director of Public Welfare, Hearings Before Subcommittee of the Committee on Appropriations, U.S. Senate, 90th Cong., 2d Sess., p. 858 (1968) to the effect that the committed child caseload per social worker at Cedar Knolls was 110 as compared to a recommended caseload of 30 ("if we are to give the supervision necessary, then we will have to have reduced caseloads in order to do an effective job".) There was a ratio of one recreation leader to each 275 youngsters; no clerical person in the central clinic serving 2,000 children. At Maple Glen, the institution for younger boys, the caseload was 80 per social worker; and one recreation worker for 240 children (p. 859). Counselor coverage did not even provide for 2 per night to supervise cottages of 50 boys.

82/ "Even when commitment is indicated, the Court is aware that overcrowded conditions, inadequately qualified staff and excessive caseloads of institutional personnel do not enhance rehabilitation. Yet often there is no other choice." Annual Report, pp. 23,41. See also D.C. Crime Commission Report, p. 656 (74% of rapists, 72% of robbers, 60% of burglaries have juvenile records.)

These statistics show all too well that the meagre resources of the Court and the community are presently so diluted that they cannot do the job of processing and rehabilitating the numbers thrust into the system. It will be a far better use of these resources to limit them to the youths that clearly -- and by the same due process standards as adults -- need them. It will be a far better investment for the community to concentrate its woefully inadequate resources on such children. 83/

The special but limited facility of the Juvenile Court can best be used selectively with respect to youths found guilty "beyond a reasonable doubt" in full due process hearings. To attempt to bring within the juvenile justice system in its present undernourished state youths about whose guilt there is any real question is to do Society as

---

83/ "In the absence of greater evidence as to their effectiveness, the wisest policy is to refrain from implicating children in the delinquency control apparatus insofar as possible, and to invoke that apparatus only when it is clear that the conduct of the juvenile in question requires it for the protection of the community. See Report of D.C. Crime Commission, p. 657, National Crime Commission, Challenge of Crime in a Free Society, p. 81, Task Force Report, p. 419."

well as those youths a grave injustice.[84]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District of Columbia Court of Appeals, hold that a youth convicted of a criminal offense is denied his constitutional rights unless he is proved guilty beyond a reasonable doubt, and remand for a new trial.

84/ Cf. Two Brothers and a Case of Liquor, 95 Wash. L. Rptr. 113 (D.C. Juv. Ct. 1967), cited in In Re Gault, 387 U.S. 1, 11 (1967). "There is nothing in the parens patriae concept which is inconsistent with the exclusionary rule. The rehabilitative goal of the Juvenile Court is to instill respect for law and order. Such a goal is best realized if the police are required to deal fairly and legally with juveniles. It would be shortsighted to separate means and end in applying the parens patriae theory. The agent of rehabilitation (the Juvenile Court) cannot thereby condone police procedures which deal illegally and unfairly with the child and his family."

Respectfully submitted,

Lawrence H. Schwartz
Legal Aid Agency
310 Sixth Street, N.W.
Washington, D.C. 20001

Patricia M. Wald
Neighborhood Legal Services Program
416 Fifth Street, N.W.
Washington, D.C. 20001

Woodley B. Osborne
Neighborhood Legal Services Program
416 Fifth Street, N.W.
Washington, D.C. 20001

Counsel for Appellant
(Appointed by this Court)

Of Counsel:

James H. Cohen
COVINGTON & BURLING
888 16th Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for Appellant was mailed, postage prepaid, December 15, 1969, to Richard W. Barton, Assistant Corporation Counsel, Room 310, District Building, 14th and E Streets, N.W., Washington, D.C. 20004.

Lawrence H. Schwartz

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,276

IN THE MATTER OF RUFUS JOHNSON

No. 23,199

IN THE MATTER OF NEWTON MILBY ELLIS

No. 23,274

IN THE MATTER OF JAMES EDWARD COWARD

Appeal From The District Of Columbia
Court Of Appeals

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C.

I N D E X

Page

SUBJECT INDEX

CASES CITED

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

OTHER AUTHORITIES CITED

---

* Cases and authority chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,276

IN THE MATTER OF RUFUS JOHNSON

No. 23,199

IN THE MATTER OF NEWTON MILBY ELLIS

No. 23,274

IN THE MATTER OF JAMES EDWARD COWARD

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

ISSUES PRESENTED FOR REVIEW

1. Whether application of a preponderance of the evidence standard of proof in the determination of the juvenile delinquency of appellants is at variance with constitutional considerations of due process and equal protection.

2. Whether this Court should exercise its supervisory power to require that the preponderance of the evidence standard be abandoned in juvenile delinquency proceedings in favor of a stricter standard of proof.

3. Whether there is in the record sufficient basis for the finding of the Juvenile Court as to appellant Ellis "that the allegations of the petition have been established by proper, competent and sufficient proof, and by a preponderance of the evidence."

4. Whether appellant Coward was afforded adequate notice as to the Juvenile Court's basis for adjudging him a delinquent.

5. Whether appellant Coward's adjudication of delinquency is supported by substantial evidence.

The cases have previously been before this Court only for the purpose of ruling on the respective petitions for the allowance of an appeal.

REFERENCES TO RULINGS

In the Matter of Rufus Johnson, No. 23,276.

The opinion of the District of Columbia Court of Appeals was rendered June 16, 1969 (253 A. 2d 462), and appears at page 122 of the record.

The ruling of the Juvenile Court respecting the applicable standard of proof was entered February 12, 1968. This ruling and the court's related jury instructions appear at pages 90, 91, 109, 110, 111 of the record.

In the Matter of Newton Milby Ellis, No. 23,199.

The opinion of the District of Columbia Court of Appeals was rendered May 23, 1969 (253 A. 2d 789), and appears at page 52 of the record.

The ruling of the Juvenile Court respecting the applicable standard of proof was entered on November 28, 1967, and appears at pages 2 and 46 of the record.

The orally pronounced findings of the Juvenile Court were entered November 28, 1967, and appear at pages 42 and 43 of the record.

In the Matter of James Edward Coward, No. 23,274.

The opinion of the District of Columbia Court of Appeals was rendered June 16, 1969 (254 A. 2d 730), and appears at page 104 of the record.

The ruling of the Juvenile Court respecting the applicable standard of proof was entered March 28, 1968, and appears at pages 2, 87, and 99 of the record.

The orally pronounced findings of the Juvenile Court were entered March 28, 1968, and appear at page 93 of the record.

COUNTER-STATEMENT OF THE CASE

Preliminary Statement

Following hearings in the Juvenile Court, appellants were adjudged delinquent and found to be within the court's jurisdiction. The District of Columbia Court of Appeals affirmed the judgments of the Juvenile Court and this Court thereafter allowed appeals. The principal contention advanced by each appellant relates to the constitutional propriety of the evidentiary standard applied in connection with the delinquency determinations. Certain subsidiary contentions are advanced by appellants Ellis and Coward, and the facts relevant to these contentions are as follows:

Appeal of Newton Milby Ellis, No. 23,199

In a petition filed in the Juvenile Court on January 9, 1967, it was alleged that on November 19, 1966, appellant Ellis, age 14 years, "* * * unlawfully entered the premises at the Irving's Men Store, 3112 - 14th Street, N. W., in the District of Columbia, by breaking the front show case window * * *." It was further alleged that, following the breaking, appellant took from the store certain property without right, including a man's bathrobe. (R. 1.) At trial to the court without a jury on November 28, 1967, the evidence adduced was, in substance, as follows:

On November 19, 1966, at approximately 2:00 a.m., Detective John M. Oliva, of the Metropolitan Police Department, and a fellow officer were proceeding in a police cruiser in a southerly direction in the 3100 block of Fourteenth Street, Northwest. Detective Oliva heard "what sounded like glass breaking" and "instantly" observed three individuals running from the areaway leading from Irving's Men's Shop. (R. 17, 20.) The individuals ran south on Fourteenth Street and then west in the 1400 block of Irving Street and were carrying clothing and other objects. The officers pursued the fleeing individuals and commanded them to stop. Appellant was the last in the group and, as he turned around to look, he dropped the bathrobe, introduced into evidence as Government's Exhibit No. 1, and stipulated to have been taken from Irving's Men's Shop on the occasion in question. (R. 15-19, 21, 22.) When apprehended by the officers, he was standing about two feet beyond the bathrobe (R. 18, 22). According to Detective Oliva, appellant stated that the window was broken by one of his companions, but admitted that he "reached in and got the robe" (R. 24).

Testifying in his own behalf, appellant denied taking any property from Irving's Men's Shop, denied having a bathrobe in his possession at any time, and denied that he was standing in the vicinity of the bathrobe when the police picked it up (R. 29, 30, 32, 35-37).

At the conclusion of all the evidence, the court heard the arguments of counsel (R. 39-42). The court then noted the testimony of Detective Oliva that appellant was with the boys who broke the window of Irving's Men's Shop and that, together with these boys, appellant subsequently fled from the scene. In this connection, the court specifically noted that appellant was "the last to catch up." The court made reference to the officer's testimony that appellant "definitely" dropped the bathrobe in question, to appellant's testimony respecting his denial of having the bathrobe in his possession, and also to his denial of having been with the group of persons who broke the window of Irving's Men's Shop. (R. 42, 43.) The court then found "that the allegations of the petition have been established by proper, competent and sufficient proof, and by a preponderance of the evidence," adjudged appellant to be within it's jurisdiction, placed him on probation for an indeterminate period, and released him in the custody of his grandfather (R. 2, 43-44, 46).

Appeal of James Edward Coward, No. 23,274

In a petition filed in the Juvenile Court, it was alleged that appellant Coward, age 16:

> "* * * along with Paul Frazier, Alvin Clarke and Michael Leroy Robinson on or about

November 22, 1967, at about 10:00 P.M., at 1700 New Hampshire Avenue, within the District of Columbia, unlawfully assaulted Joseph Tate with a dangerous weapon, that is, a knife, contrary to and in violation of 22 D. C. Code 502 (1967).

"(2) Said child and the above, at the same time, and date as above within the District of Columbia, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Joseph Tate, property of Joseph Tate of the value of about $18.00, consisting of one (1) wallet, and $18.00 in money and personal papers, contrary to and in violation of 22 D. C. Code 2901 (1967)." (R. 1.)

The substance of the evidence adduced at trial is as follows:

On the evening of November 22, 1967, Joseph Tate, while in the company of his brother Oliver Hinton, was operating his automobile on Corcoran Street, Northwest (R. 14, 16). As the automobile was about to enter the 1700 block of New Hampshire Avenue, it slowed because of traffic congestion, and appellant and two other youths ran out from between parked cars. One of the youths opened the door on the driver's side and yanked Tate out of the automobile. (R. 14, 17, 22, 23.) The other youths opened the door on the passenger's side, grabbed Hinton, ran their hands through his pockets and asked if he had any money (R. 17, 23, 24). Upon Hinton's failure to produce money, appellant "smacked" him (R. 23, 24, 27). Hinton broke loose from

his assailants and ran toward Fourteenth Street (R. 14, 23, 24), and Tate, after momentarily fighting with his assailant, ran into a nearby alley but discovered it was a dead-end (R. 14, 15, 17, 18). Approximately five youths followed Tate into the alley where they knocked him to the ground, stabbed him, and robbed him of $18.00, a set of keys, and a wallet (R. 15, 18, 19).

Later that same evening, appellant and two other youths were apprehended by police and taken to the scene and identified by Tate as "being included in the group of people that had assaulted him" (R. 29, 30). Appellant fled when identified, but was chased and again apprehended by a police officer (R. 30, 31).

Appellant testified in his own behalf that, shortly before 9:00 p.m. on the evening in question, he left a party on Belmont Street in the company of several youths with the intention of going to another party in the vicinity of Francis Junior High School (R. 43). Upon reaching the intersection of New Hampshire Avenue and S Street, Northwest, he observed a car coming down the street (R. 44). When the automobile stopped, both the driver and passenger got out and were subsequently involved in an altercation with several of his companions (R. 41, 50-52). While the altercation was in progress, he crossed the street to get his jacket from a friend and, after obtaining it, commenced

walking toward "U" Street in the company of two other boys. When the group crossed Seventeenth and R Streets, he observed a police officer "running up behind him." (R. 45, 46, 54, 55.) He attempted to flee, but was apprehended by the police officer and returned to the scene of the altercation, where he was identified by either Tate or Hinton as "one of them" (R. 46, 47). When asked to comment on Hinton's testimony that he had "smacked" Hinton, appellant stated that "* * * the boy that was on that side of the street, he was about my heighth [sic] -- there were two on that side that was [sic] my heighth [sic]. * * * I wasn't over there." (R. 55.)

Jerome Cook testified in behalf of appellant that, on the evening in question, he, appellant, and one Gregory Henson were walking toward Francis Junior High School (R. 62). As the group proceeded along New Hampshire Avenue, appellant called to someone on the other side of the street and then "* * * started going towards the person he called in the group across the street and a car almost hit him." (R. 63, 68, 69.) The driver stopped, got out, and started arguing with appellant (R. 63). Then several other boys "started crowding around and a tall guy struck * * * [the driver] in the face" (R. 63, 64). At this point, appellant went to the passenger side of the car (R. 70, 72). Cook did not see anyone hit the passenger but remembered that "the passenger was running" (R. 72).

Gregory Henson also testified in behalf of appellant that, on the evening in question, he, appellant, and Cook were on their way to Francis Junior High School. As appellant was crossing the street in the 1700 block of New Hampshire Avenue, he was "almost hit by a car." (R. 75.) When the car stopped, the driver got out and was struck by a tall boy (R. 75, 76, 81, 82). He did not see appellant hit anyone (R. 77), and, when some youths approached the driver's side of the car, appellant was on the other side of the street talking to some girls (R. 81). He did not remember whether any youths approached the passenger side of the car and did not know what happened to the passenger (R. 81).

At the conclusion of all the evidence, the court found that appellant had committed the offense set forth in Count 1 of the petition (assault with a dangerous weapon), but had not committed the offense set forth in Count 2 of the petition (robbery) (R. 89). At a later point in the proceedings, however, the court vacated its finding as to Count 1 and ruled that the evidence justified the finding that appellant had committed simple assault, rather than an assault with a dangerous weapon.

ARGUMENT

I

Proof by a preponderance of the evidence in juvenile delinquency proceedings is consistent with both constitutional standards of fairness and the basic concept of juvenile law.

The principal contention advanced by appellants is that proof beyond a reasonable doubt is the only constitutionally permissible standard of proof in juvenile delinquency proceedings. Appellants claim that the application of such a standard of proof is dictated by considerations of due process and equal protection and especially by the Supreme Court's relatively recent holding in In re Gault, 387 U. S. 1 (1967). As will be demonstrated, such a thesis cannot be squared with established constitutional principles, with the rationale of Gault, or with the majority of post-Gault appellate decisions which have dealt with the precise issue involved.

Even in criminal cases involving adult offenders, one will search the decisions of the Supreme Court in vain for a definite holding that proof beyond a reasonable doubt is required as a matter of constitutional law. This standard evolved no earlier than the end of the 18th century and applied only in capital cases. It was subsequently incorporated in many statutes and made applicable to other offenses. 9 Wigmore on

Evidence, 3rd ed., § 2497 at 317. The failure of any of the first ten amendments to the Constitution to incorporate such an evidentiary standard would seem to argue against the notion that it is constitutionally applicable even in criminal proceedings. See Michael and Cunningham, From Gault to Urbasek, The Best of Both Worlds, 49 Chicago Bar Record 162, 166 (1968). A recent decision of a sister circuit points out that "there is no such constitutional burden" whereby the defendant's guilt in criminal cases must be established by proof beyond a reasonable doubt, noting that he need only be "given a fair trial in accordance with constitutionally permissible rules of procedure." United States v. Mancusi, 393 F. 2d 482 (2nd Cir., 1968). And the highest court of the State of Ohio made a like observation in In re Agler, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969), a post-Gault decision dealing with the same question involved here.

Appellants' interpretation of Gault, supra, is clearly a strained one. The precise matters with which Gault was concerned were notice of charges, right to counsel, right to confrontation and cross-examination, and protection against self-incrimination. These matters are joined by a common thread, namely, the ability to bring to the attention of the court, in an unimpeded manner, all available, truthful, accurate, and reliable evidence which is legally obtained. The standard by which

that evidence is evaluated once it is effectively brought before the court is quite another matter. Furthermore, a very recent decision makes the rather significant observation that the constitutional guarantees dealt with in Gault are by no means peculiarly applicable to criminal trials "but prevail generally in civil and administrative proceedings." Thus in In re Agler, supra, the Court said (249 N. E. 2d at 813):

> "* * * Notice and an opportunity to be heard are basic to civil jurisdiction. See In re Gault, supra, 387 U. S. at 33-34 & n. 53, 87 S. Ct. 1428. The privilege against self-incrimination prevails independently of an actual criminal prosecution, dependent only upon the possibility of prosecution arising from the subject matter for which it is asserted. Murphy v. Waterfront Commission, etc., 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678. The right of confrontation does no more than secure an opportunity for cross-examination correlative to the hearsay rule, which is designed to assure reliable evidence in all kinds of proceedings. The right to be represented by counsel is common to civil proceedings, although the right of indigents to appointed counsel is not. In this last respect, juvenile proceedings present a special problem because the child whose interests are drawn into question is not sui juris, and is, both legally and as a practical matter, unable to take responsibility therefor. * * *"

On the other hand, a rule of evidence like that challenged here does not enjoy the same constitutional priority, since it involves general procedural fairness as opposed to specific constitutional rights such as the privilege against self-incrimination. See Spencer v. Texas, 385

U. S. 554, 564-565 (1967). Indeed, even in criminal cases, the Supreme Court has consistently afforded both legislatures and lower courts considerable constitutional leeway in the development and formulation of rules of evidence and procedure. Spencer v. Texas, supra; Leland v. Oregon, 343 U. S. 790 (1952); Mobile, J. & K. C. RR. v. Turnispeed, 219 U. S. 35, 43 (1910); and see Stump v. Bennett, 398 F. 2d 111, 113-114 (8th Cir., 1968); compare Miller v. United States, ___ U. S. App. D. C. ___, 413 F. 2d 1097, 1099-1100 (1969). Manifestly, there is greater constitutional leeway on the juvenile side of the court. See Comment: In re Gault: Understanding the Attorney's New Role, 12 Vill. L. Rev. 803, 824-825 (1967), in which the view is expressed that, conformably with Gault, the juvenile court judge is left with a broad range of discretion with respect to the admission and exclusion of evidence in delinquency proceedings, and that in certain instances, even the admission of hearsay evidence may be justified.

One need reach no further than Gault itself to justify the conclusion that the Supreme Court has by no means attempted to alter the basic philosophy of juvenile justice. Respecting the future course of juvenile delinquency proceedings, the Court stated that:

> " * * * the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. * * * " (387 U. S. at 21.)

The Court added that it did not mean to:

> " * * * denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. Further, we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' There is, of course, no reason why this should not continue. * * * " (Id. at 22-23; emphasis added.)

The Court went on to stress the undesirability of the incorporation of a complete adversary system into the juvenile process, stating as follows:

> " * * * Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary sys-

> tem, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite * * * ." (Id. at 26-27; emphasis added.)

Finally, the Court reiterated a highly significant pronouncement made by it just a short time earlier in Kent v. United States, 383 U. S. 541, 562 (1966) (a case of local origin):

> "We do not mean * * * to indicate that the [juvenile court] hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. * * * " (Id. at 30; emphasis added.)

A clear majority of appellate tribunals elsewhere which have passed on the precise question involved have held that the rationale of Gault cannot be stretched to require that juvenile delinquency be established by proof beyond a reasonable doubt. See State v. Santana, 444 S. W. 2d 614 (Supreme Court of Texas, 1969); State v. Arenas, ___Or. ___, 453 P. 2d 915 (Supreme Court of Oregon, en banc, 1969); In re M, 75 Cal. Reptr. 1, 450 P. 2d 296 (Supreme Court of California, en banc, 1969); In the Matter of Samuel W., 24 N. Y. 2d 196, 299 N. Y. S. 2d 414, 247 N. E. 2d 253 (1969); cf. In re Agler, supra (the Court holding that clear and convincing proof of delinquency is required, but rejecting the notion that the Gault rationale compels proof beyond a reasonable doubt).

In In re M, 75 Cal. Reptr. 1, 450 P. 2d 296 (1969), the California Supreme Court, en banc, in commenting upon the effect of Gault on juvenile justice, stated:

> "* * * 'those who find in Gault the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. * * * It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards. * * * [W]e are in full agreement with the holding of the Supreme Court that the constitutional safeguards of the Fourteenth Amendment guaranteed to adults must similarly be accorded juveniles. It is inconceivable to us, however, that our highest Court attempted, through Gault, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system; it did not ignore the need for each judge to determine the action appropriate in each individual case; it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques.' * * * " (450 P. 2d at 302.)

Respecting the precise issue involved here, the Court reasoned that to adopt a reasonable doubt standard in juvenile proceedings would

be to "introduce a strong tone of criminality into the proceedings" and went on to say (450 P. 2d at 303) that:

> "* * * The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after Gault, as we have seen, juvenile proceedings retain a sui generis character: although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt,' come into play: e.g., the advantages of maintaining a non-criminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged -- although the very heart of an adult criminal prosecution -- may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.'" [Emphasis added.]

And in State v. Arenas, ____ Or. ____, 453 P. 2d 915 (1969), the Oregon Supreme Court, en banc, was presented with the quantum of proof question under a statute setting forth grounds for the juvenile court's jurisdiction similar to those contained in our local statute (com-

pare § 11-1551(a), D. C. Code, 1967, with 453 P. 2d at 918). The Court observed that:

> " * * * as subsections (b), (c) and (f), beyond parental control, endangering self or others, and runaway, illustrate, the requisite conduct is more symptomatic than 'criminal.' Even subsection (a), acts which would be crimes if committed by adults, is intended to have this same characteristic.
>
> * * * * * * *
>
> 'It is true that in order to obtain jurisdiction by subsection (a) it must be proved by some degree of evidence that the juvenile committed some act. * * * The degree of proof that should be required, however, is closely related to the basic philosophy of juvenile law 'to deal with the child because he needs corrective treatment, not because he is "guilty" of a "crime."' " [Emphasis added.]

Concluding that such a "basic philosophy of juvenile law" was left undisturbed by Gault, the Court said (453 P. 2d at 919-920):

> "If the constitution requires that a juvenile cannot come within the jurisdiction of the court unless criminal conduct is proved beyond a reasonable doubt, the great juvenile experiment is over.
>
> "If such a burden of proof is constitutionally required, it logically follows that subsections (b), (c), and (f) of the statute are in violation of the constitution. Such subsections do not describe conduct which is necessarily criminal. These subsections concern delinquency, not child dependency. In the event the court finds

such conduct has occurred, the legislature has empowered the juvenile court to deprive the juvenile of his freedom if that is believed desirable. ORS 419.509.

"If the constitution is held to prohibit the juvenile court from depriving a juvenile of his freedom unless it is proved beyond a reasonable doubt that he committed a criminal act, the constitution would have to be interpreted to prohibit depriving a juvenile of his freedom when he was found to have engaged in conduct not amounting to a crime.

"The logical end of such reasoning would be the conclusion that regardless of how apparent the need for intervention for the good of the child, the community, the judiciary and every other institution or agency would be powerless to act until and unless criminal conduct could be proved beyond a reasonable doubt." [Emphasis added.]

And in In the Matter of Samuel W, supra, the Court also concluded that the salutary rehabilitative and non-punitive concept underlying the Juvenile Court system had not been eroded by Gault so as to require that delinquency be established by proof beyond a reasonable doubt.[1] The Court noted the existence of a legislative policy calling for "[c]areful and explicit safeguards * * * to insure that an adjudication of * * * [delinquency] is not a 'conviction.'" 299 N. Y. S. 2d at 417.

---

[1] This case is now pending in the United States Supreme Court (No. 778). It was argued on January 20, 1970, and now awaits decision.

Thus, observed the Court, the delinquency finding envisioned by the applicable statute "affects no right or privilege, including the right to hold public office or to obtain a license * * *; and a cloak of protective confidentiality is thrown around all the proceedings * * * ." 299 N. Y. S. 2d at 418. According to the Court, Gault was a "hard case" with "facts easily dramatized" and not "typical of the vast mass of juvenile proceedings in the United States." 299 N. Y. S. 2d at 418. Upholding the preponderance of the evidence standard as constitutionally premissible, the Court said (299 N. Y. S. 2d at 420):

> 'It is not easy to define for the purposes of practical application the tenuous difference between 'beyond a reasonable doubt' as a quantitative or qualitative test of proof, and 'by a fair preponderance of evidence'. It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a 'higher' standard.
>
> * * * * * * *
>
> "The decision in Gault, in which there was almost a total absence of due process, is not necessarily to be read as an interdiction of this standard of proof required by the New York statute. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of a crime. * * * "

Finally, in State v. Santana, supra, an even more recent post-Gault decision dealing with the problem involved, the Court, upon con-

sidering various pronouncements made in Gault, stated as follows (444 S. W. 2d at 617):

> "We ascribe to the Gault court not a desire to abolish the attempt of the state to treat and rehabilitate the child through juvenile proceedings, but a laudable mandate that in juvenile proceedings, the rights of the child be preserved; that the proceedings be conducted with basic fairness. Instead of the worst of both worlds under the abused juvenile proceedings, the Gault court, it is thought, desired to preserve the best of both worlds for the minor, i.e., the individual, particularized treatment of the disturbed, rebellious or wayward minor, while at the same time, insuring that the hearings be conducted with dignity and fairness and with the essentials of due process being observed."

The Court then reviewed the various other post-Gault decisions dealing with the quantum of proof issue and rejected the notion that proof beyond a reasonable doubt is constitutionally required in juvenile delinquency proceedings. In this connection, the Court said (444 S. W. 2d at 622):

> "We recognized able arguments and writings on both sides of this question. We have concluded that Gault does not require that the juvenile trial be adversary and criminal in nature, and that the 'beyond a reasonable doubt' test is not required. We are therefore persuaded to follow the reasoning of the opinions of the Court of Appeals of the District of Columbia, and the highest courts of New York, California and Oregon."

The same considerations articulated by these post-Gault cases are no less appropriate here. Our local Juvenile Court Act, as construed by this Court, is based on policy considerations designed "to eliminate the formalities of a criminal proceeding which emphasizes 'punishment and retribution' and to provide in its place a more informal procedure designed to enhance the protective and rehabilitative features which have come to be associated with modern juvenile courts." Shioutakon v. District of Columbia, 98 U. S. App. D. C. 371, 373, 236 F. 2d 666, 668 (1956). See also Creek v. Stone, 126 U. S. App. D. C. 329, 332, 379 F. 2d 106, 109 (1967). Yet to incorporate in the juvenile system the rigid standard of proof claimed applicable by appellants would be to introduce the "strong tone of criminality" considered by the California Supreme Court to transcend the spirit of Gault. See In re M, 450 P. 2d.296, 302-303.

And here, too, the applicable statute, in setting forth grounds for the Juvenile Court's jurisdiction, speaks in terms of certain specified kinds of wayward behavior rather than in terms of crimes. The most cursory glance at § 11-1551(a), D. C. Code, 1967, will disclose that this kind of behavior is manifestly "more symptomatic than 'criminal.' " Borrowing on the logic of the Oregon Supreme Court in State v. Arenas, supra, such behavior readily lends itself to the pre-

ponderance of the evidence standard of proof consistent with the basic philosophy of juvenile law whereby the child is dealt with "because he needs corrective treatment," not because he is "guilty" of 'crime." 453 P. 2d at 918. Or as Judge Cayton observed in appellant Coward's case:

> "Section 11-1551(a)(1) of the D. C. Code 1967 edition, enumerates nine grounds upon which juvenile court jurisdiction may rest, the first being that applicable to the instant case. We can conceive of no reason why the jurisdictional facts should not be established by the same standard as to all; or why appellant would have us burden the government with proving that a juvenile violated a law 'beyond a reasonable doubt' when it need only prove by a preponderance of the evidence that a youth is, for example, 'habitually truant' under subsection (c)." (254 A. 2d at 732.)

Other statutory provisions of local application further illustrate that the standard of proof applicable in criminal cases need not be engrafted in the juvenile process in order to insure the kind of fundamental fairness with which Gault was concerned. Thus, an adjudication of juvenile delinquency does not carry with it consequences similar to those sustained by an adult offender. The juvenile, unlike the adult offender, is given a non-public trial (§ 16-2307, D. C. Code, 1967), and an adjudication of delinquency, since not "deemed a conviction of a crime," does "not operate to impose any of the civil disabilities

ordinarily imposed by conviction and a child is not deemed a criminal by reason of an adjudication." See § 16-2308(d), D. C. Code, 1967. For this reason, the adjudication does not carry with it the attendant employment disabilities and other stigmas which accompany a criminal conviction. Thus, the juvenile offender may not be subjected to the increased penalties set forth in the second offender statute (§ 22-104, D. C. Code, 1967) should he, either as a juvenile or as an adult, repeat the offense. In addition, he is not criminally confined following the adjudication of delinquency. To the fullest possible extent he is accorded education, care, and other rehabilitative treatment designed to correct his wayward behavior (§§ 16-2308(a) and 16-2316(3), D. C. Code, 1967), and it is statutorily impermissible to bring him "in contact or communication with an adult convicted of crime * * * ." § 16-2313, D. C. Code, 1967.

Nor, contrary to appellants' position, is the threatened loss of liberty a sufficient constitutional basis for classifying juvenile proceedings with criminal proceedings for quantum of proof purposes. There are several other instances in which one's liberty may be taken away by a civil proceeding in which the applicable evidentiary standard is proof by a preponderance of the evidence. For example, concerning the commitment of mental patients, see § 21-545, D. C. Code, 1967;

In re Alexander, 125 U. S. App. D. C. 352, 372 F. 2d 925 (1967). Concerning the commitment of sexual psycopaths, see § 22-3508, D. C. Code, 1967; Minnesota v. Probate Court, 309 U. S. 270 (1940); Carras v. District of Columbia, 183 A. 2d 393 (D. C. Mun. App., 1962). And concerning the commitment of narcotics addicts, see § 24-607(b), D. C. Code, 1967; cf. In re M, 450 P. 2d 296, 303-304, footnote 11. Moreover, in Leland v. Oregon, supra, the Supreme Court held that in a criminal proceeding a state may constitutionally compel a defendant to establish his insanity defense by proof beyond a reasonable doubt. And in In re M, supra, the Court pointed out that "even in adult criminal trials * * * the standard of proof 'beyond a reasonable doubt' applies only to the issue of guilt itself" and went on to cite examples of several other issues arising in criminal proceedings as to which a lesser quantum of proof is applicable. See 450 P. 2d at 303, footnote 10.

Clearly, therefore, the considerations of due process and fundamental fairness enunciated in In re Gault do not require abandonment of the preponderance of the evidence standard of proof in juvenile delinquency proceedings.

Appellants additionally assert that equal protection considerations require that the reasonable doubt standard applicable in criminal pro-

ceedings be imported into local juvenile delinquency proceedings. Such an assertion is baseless. Equal protection requires that persons similarly circumstanced be similarly treated, not merely that they be given some of the guarantees applicable to others in a given category. See Louisville Gas Co. v. Coleman, 277 U. S. 32, 37 (1928). If, then, the equal protection doctrine requires that juvenile delinquency proceedings be equated with adult criminal proceedings, the only proper application of the doctrine would be one whereby the alleged juvenile delinquent must be accorded all rights given to his adult counterpart, not just the right to have his delinquency established by proof beyond a reasonable doubt. Clearly, however, equal protection considerations impose no such requirement for, as previously noted, the basic philosophy of juvenile justice, as retained by Gault, militates most strongly against wholesale incorporation into the juvenile process of every right accorded the adult criminal defendant. And see Kent v. United States, 383 U. S. 541, 556. Thus, appellants' equal protection argument cannot be squared with the Kent-Gault rationale itself. It also follows that the post-Gault decisions which have dealt with the quantum of proof issue in an equal protection context -- see, for example, In re Urbasek, 38 Ill. 2d 535, 232 N. E. 2d 716 (1967); United States v. Costanzo, 395 F. 2d 411 (4th Cir., 1968) -- misconceive the correct thrust of Gault.

Of course, it should be added that the many differences between the local criminal and juvenile processes previously discussed likewise justify the conclusion that the juvenile offender cannot properly be compared with his adult counterpart for purposes of equal protection. See In the Matter of Samuel W, 299 N. Y. S. 2d 414, 420.[2]

---

[2] In an attempt to develop the thesis that the "juvenile court operates essentially as a criminal court at the adjudication stage" (brief at 58), appellant Johnson relies on a wealth of ex parte material, including alleged "interviews" ostensibly conducted with various administrative officials (brief, 64-68, 73, 75). Such an approach is grossly improper and should, of course, be rejected by the Court as without foundation in the record. As recently as January 8, 1970, this Court observed that:

> "* * * It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on the basis of a cold printed record; when that record is replaced by the incomplete hearsay recollections of one of the parties, our review is turned into an exercise in creative imagination. 'It is a cardinal rule of appellate practice that the facts are those found in the record and not those found in the minds of the attorneys.' [Citations omitted]" (United States v. Workcuff, ___ U. S. App. D. C. ___, ___ F. 2d ___, U. S. App. No. 22,555.)

II

This Court should not exercise its supervisory power to require that juvenile delinquency be established by proof beyond a reasonable doubt.

It is alternatively urged that this Court, in the exercise of its supervisory power, should require that juvenile delinquency be established by proof beyond a reasonable doubt. The origin of appellate supervisory power as an independent basis for decision may be traced to McNabb v. United States, 318 U. S. 332, 340-347 (1943), a criminal case. Although the exercise of supervisory power is also appropriate in civil cases -- Thiel v. So. Pac. Co., 328 U. S. 217 (1946) -- the classic and most familiar ground for its exercise is in the "administration of criminal justice." See Thomas v. United States, 368 F. 2d 941, 947 (5th Cir., 1966).

Supervisory power has provided the basis for decision both in the Supreme Court and in this Court where its exercise was proper to avoid a miscarriage of justice, or where compelling constitutional or legislative considerations lurked in the background. McNabb v. United States, supra; Tate v. United States, 123 U. S. App. D. C. 261, 359 F. 2d 245 (1966); Duncan v. District of Columbia, 126 U. S. App. D. C. 371, 379 F. 2d 148 (1967); see also Hill, The Bill of Rights and The Supervisory Power, 69 Colum. L. Rev. 181, 194-198 (1969). On

the other hand, where such background considerations are absent and where there is no oppressive conduct which warrants judicial remedy, this Court has appropriately declined to exercise its supervisory power. See Ford v. United States, 122 U. S. App. D. C. 259, 265, 352 F. 2d 927, 933, en banc (1965).

A review of various notable decisions in which supervisory power has provided the basis for previous rulings of this Court will disclose that the circumstances which customarily justify its invocation are quite compelling. In Kelly v. United States, 90 U. S. App. D. C. 125, 194 F. 2d 150 (1952), this Court, in the exercise of its supervisory power, held that the uncorroborated testimony of a solitary witness was insufficient to sustain a conviction of a verbal sex offense. Lurking in the background was the factor that this type of case "lies in a field in which our courts have been traditionally unusually skeptical * * * ." In Mullen v. United States, 105 U. S. App. D. C. 25, 263 F. 2d 275 (1958), the Court employed its supervisory power to adopt a "confessor-confessant privilege," on the basis of compelling background considerations of religious freedom and public policy. In Wildeblood v. United States, 106 U. S. App. D. C. 338, 273 F. 2d 73 (1959), this Court relied on its supervisory power in holding that an individual must be afforded the assistance of counsel in preparing an

application for allowance of an appeal in a case involving a question of serious moral turpitude. The Court, however, hastened to point out that, in reaching such a result, it was merely giving effect to the spirit of Supreme Court decisions governing forma pauperis proceedings throughout the various federal courts. More recently, in Tate v. United States, supra, this Court exercised its supervisory power to require that persons convicted of misdemeanors in the United States Branch of the Court of General Sessions must be provided on appeal with a transcript at government expense, and emphasized that its holding was equitably consistent with the statute (28 U. S. C. § 1915) and decisions governing forma pauperis proceedings in the United States District Courts. Later, in Duncan v. District of Columbia, supra, the supervisory-power holding was that a person prosecuted by the District of Columbia in the Court of General Sessions is entitled to the same access to statements of government witnesses that he would have in a prosecution brought by the United States. In so holding, the Court again emphasized that it was merely applying in a local context the spirit of a congressional enactment, and Supreme Court decisions generally applicable to the United States. Finally, in Dixon v. District of Columbia, 129 U. S. App. D. C. 341, 345, 394 F. 2d 966, 970 (1968), this Court exercised its supervisory power to require dismissal of an

information filed in a "retaliatory prosecution," Chief Judge Bazelon expressing the view that the use of the Court's supervisory power was essential to "deter blatant government misconduct" and to "protect the purity of the government and its processes."

It should be readily apparent that the features of these cases considered sufficient to justify the invocation of this Court's supervisory power were demonstrably persuasive. But it is difficult to visualize the instant case as one which even arguably partakes of comparable features. As already noted, this is not a criminal case and, therefore, is quite different from those in which the Court's supervisory power has been most frequently exercised in the past. Nor does this case involve the slightest suggestion of oppressive governmental misconduct. The most important counterbalancing factor, however, is that the legislative and policy considerations which form the background of juvenile justice plainly require the withholding, rather than the exercise, of this Court's supervisory power. The underlying notion of the Juvenile Court Act, as left undisturbed by the philosophy of In re Gault, supra, is that flexible and informal procedures are essential to the parens patriae functions of the court. See District of Columbia v. Jackson, et al., ____A. 2d ____ (D. C. App. Nos. 4934, 4935, 4936, decided January 28, 1970, slip opinion at 3), citing Harling v. United

States, 111 U. S. App. D. C. 174, 177, 295 F. 2d 161, 164 (1961). See also Pee v. United States, 107 U. S. App. D. C. 47, 49-50, 274 F. 2d 556, 558-559 (1959). This notion is manifestly inconsistent with the strong tone of criminality which a rigid standard of proof would bring to local juvenile delinquency proceedings. Shioutakon v. District of Columbia, 98 U. S. App. D. C. 371, 373, 236 F. 2d 666, 668. Compare In re M, 450 P. 2d 296, 302-303. Consequently, the imposition of such a standard of proof through the exercise of this Court's supervisory power would subvert rather than implement the humane and beneficent purpose of the Juvenile Court Act. Cf. Kent v. United States, 383 U. S. 541, 554-556 (1966).

Moreover, as pointed out in Argument I, supra, under the statutory and decisional law in this jurisdiction, a mentally incompetent person, a narcotics addict, and a sexual psychopath may be committed for an indefinite duration in a proceeding in which the applicable standard of proof is by a preponderance of the evidence. The congressional purpose in providing for the commitment and treatment of these types of individuals is manifestly a rehabilitative one in furtherance of the welfare of both the patient and society. It is clear, however, that the very same rehabilitative considerations underlay our local Juvenile Court Act. Thus, should this Court decline to exercise its supervisory

power for the purpose of modifying the preponderance of the evidence standard in juvenile delinquency proceedings, the Court would accomplish the salutary purpose of achieving procedural and evidentiary consistency among various types of local proceedings with similar beneficial features. As this Court has observed in the past, it is quite proper to withhold the exercise of judicial supervisory jurisdiction in the interest of maintaining a consistent and harmonious body of law. Ford v. United States, 122 U. S. App. D. C. 259, 265, 352 F. 2d 927, 933 (1965).

Practical considerations also render inappropriate an exercise of supervisory power designed to disturb the existing standard of proof in juvenile delinquency proceedings. In this connection, in a post-Gault commentary discussing the adaptability of a clear and convincing evidence standard to Juvenile Court proceedings, it is observed that "the problem of accurately applying or even defining [such a] * * * standard seems to outweigh any benefit its adoption could produce." See Comment on In re Urbasek, 53 Minn. L. Rev. 883 at 892 (1969), citing Wigmore on Evidence, § 2497, 3rd ed., 1940. And the concurring and dissenting opinion in In re Agler, supra, makes the following significant observation (249 N. E. 2d at 817):

"Finally, I am persuaded by the following argument, made in the brief amicus curiae of the National Council of Juvenile Court Judges and the Ohio Association of Juvenile Court Judges, filed in the instant case:

" 'In the first place, it is very hard to draw a precise line between the various degrees of proof. Proof by a preponderance of the evidence is defined as that quantum of proof that has more convincing force, and produces in the mind of the trier of fact belief that what is sought to be proved is more likely true than not true. * * * On the other hand, these same authors define proof beyond a reasonable doubt as being such as the trier of fact would be willing to rely and act upon in the most important of his own affairs. * * * These are rather subtle differences at best * * * .' " [Emphasis added.]

The totality of the foregoing considerations should prompt the Court to withhold the exercise of its supervisory power here. If, however, this Court now intends to adopt a new and stricter standard of proof in Juvenile Court proceedings, its ruling should, of course, be made prospective only.

III

The finding of the Juvenile Court that appellant Ellis falls within the jurisdiction is legally sufficient.

Embracing the remarks of the Juvenile Court at the conclusion of the evidence appellant Ellis contends that the court did not find in a

legally sufficient manner that his conduct constituted the violations of law charged in the petition. The petition alleged that appellant, along with three others, unlawfully entered a certain store by breaking the front window and obtained from the store certain property without right, including a man's bathrobe. Appellant concedes that there is sufficient evidence of record on which to predicate ruling that he engaged both in the storebreaking and the related bathrobe theft (brief, 9-10), and the court's judgment and order entered November 28, 1967, specifically recites that "the allegations of the petition have been established by proper, competent and sufficient proof * * * ." (R. 2.) From this general finding, it is clear that the court resolved all material factual issues against appellant and, thus, of necessity, found that all allegations of the petition had been established. United Clay Products Co. v. Linder, 73 App. D. C. 389, 119 F. 2d 456 (1941); Stone Heating & Ventilating Co. Inc. v. Anacostia Leasing Corporation, 256 A. 2d 923 (D. C. App., 1969); 24A C. J. S., Criminal Law, § 1858.

The challenged remarks of the Juvenile Court, if anything, lend support to this conclusion. Thus, in commenting on the evidence adduced and in concluding that appellant came within its jurisdiction, the court made reference to the arresting officer's testimony respecting appellant's theft of the bathrobe. The court also referred to the officer's

testimony respecting the storebreaking incident, and stated that it chose to believe the testimony of the officer to the exclusion of that of appellant. (R. 43.) Considered in their totality, these remarks are wholly consistent with the recitation in the court's judgment and order (R. 2) that all material allegations of the petition had been sustained. If appellant, represented as he was by counsel, considered the court's remarks ambiguous or not sufficiently detailed, he could easily have requested the court to clarify them. His failure to do so renders inescapable the conclusion that he sustained no prejudice. Miller v. Avirom, 127 U. S. App. D. C. 367, 384 F. 2d 319 (1967).

IV

Appellant Coward was afforded adequate notice for the basis of the delinquency adjudication.

Appellant Coward asserts that he was adjudged a delinquent on the basis of facts omitted from the petition and thus was not afforded constitutionally sufficient notice. In this connection, the petition alleged in essence that appellant unlawfully assaulted Joseph Tate with a knife and additionally stole $18.00 from the person of Tate. At the conclusion of all the evidence, the court found culpability on the part of appellant only with respect to the assault with a dangerous weapon as-

pect of the case. (R. 89.) The court thereafter reconsidered this ruling and concluded that appellant's culpability stemmed from his involvement in the assault on Tate occurring on the street in the vicinity of Tate's automobile prior to the time Tate fled into the alley where the knifing and robbery took place (R. 39). It is the theory of appellant that, since the petition did not refer specifically to this simple assault, the related finding must fall for want of adequate advance notice.

When the case is placed in its correct setting, it will become readily apparent that appellant was in no manner prejudiced in his defense. As the opinion below notes, the petition notified appellant "of the place, time, and date of the alleged unlawful conduct, the nature of the violation, the names of the alleged co-perpetrators of the assault, and the name of the victim, [and] * * * the name of the intake officer who had investigated the case * * * ." 254 A. 2d at 732-733. Evidence introduced by appellee at trial related not only to the aggravated assault and robbery in the alley, but also to the simple assault in the vicinity of the Tate automobile and, thus, the assault with which the challenged finding is concerned. (See Argument V, infra.) Appellant proceeded to meet this evidence, and in so doing focused the main thrust of his defense on his asserted non-involvement in the simple assault on the street, rather than the incident in the alley. In this con-

nection, appellant endeavored to demonstrate that, at the time of the street altercation, he was at a distance from the automobile and, thus, could not have been a participant in the assault against the occupant. (R. 47, 52, 54, 64, 70, 81, 82.) And when the court announced its finding that appellant was a participant in the assault, he claimed no surprise whatever, and he does not now claim that there is material evidence that he did not submit but would have submitted, absent the challenged omission in the petition. In short, where, as here, a litigant demonstrates complete familiarity with an issue by proffering abundant evidence respecting that issue, he can voice no meaningful claim of surprise on appeal. As Judge Bazelon said in Kuhn v. CAB, 87 U. S. App. D. C. 130, 133, 183 F. 2d 839, 842 (1950), "* * * Actuality of notice there must be, but the actuality, not the technicality, must govern." See also New Castle County Airport Commission v. CAB, 125 U. S. App. D. C. 268, 270, 371 F. 2d 733, 735 (1966).

Appellant additionally asserts that the delinquency adjudication could not properly be based on an aiding and abetting theory in the absence of advance notice in the petition that appellee was proceeding on such a theory. The short answer to this assertion is that, even in criminal cases, "one charged as a principal and not specifically as an aider and abettor" may appropriately be convicted on an aiding and

abetting theory. United States v. Leeper, 413 F. 2d 123 (8th Cir., 1969); Mason v. United States, 256 A. 2d 565 (D. C. App., 1969); § 22-105, D. C. Code, 1967. Certainly, this propostion is no less applicable in juvenile delinquency proceedings. Shioutakon v. District of Columbia, supra.

V

Appellant Coward's delinquency adjudication is supported by substantial evidence.

Appellant Coward also challenges the sufficiency of the evidence to support the delinquency adjudication. As noted in Argument IV, supra, the Juvenile Court declined to base its adjudication on any participation by appellant in the knifing and robbery which took place after Tate fled into the alley, finding instead that appellant was an aider and abettor to the antecedent street assault on Tate. The evidence clearly supports this finding.

The evidence, viewed, as it must be, in the light most favorable to the Government (Glasser v. United States, 315 U. S. 60, 80 (1942)), establishes that, on the evening of November 22, 1967, Joseph Tate, in the company of his brother Oliver Hinton, was operating his automobile in the vicinity of the 1700 block of New Hampshire Avenue, Northwest (R. 14, 16). When Tate stopped momentarily because of traffic

congestion, appellant and two other boys "came out in front of the car" (R. 14, 15). One of the boys opened the door on the driver's side, "yanked" Tate out of the car, and assaulted him (R. 14, 17, 23). Appellant and another boy went to the passenger side of the car and, as Hinton opened the door and got out, appellant and the other boy grabbed him, rifled his pockets, and asked him if he had any money. When Hinton did not give appellant any money, appellant "smacked" him. (R. 23, 24, 27.) When the police arrived, appellant attempted to flee but was apprehended and returned to the scene, where he was "positively" identified by Tate as "one of the group" (R. 31).

It is axiomatic that one who aids or abets the act of the principal offender is as responsible for that act as if he committed it directly. § 22-105, D. C. Code, 1967; Williams v. United States, 190 A. 2d 269, 270 (D. C. App., 1963). It is necessary only that an individual "knowingly associate himself in some way with the criminal venture to be an aider and abettor. * * * Mere presence would be enough if it is intended to and does aid the primary actors. * * * " Long v. United States, 124 U. S. App. D. C. 14, 20, 360 F. 2d 829, 835 (1966).

The record unquestionably permits the inference that appellant not only associated himself with the unlawful assault on Tate, but aggressively sought by his actions to "make it succeed." Nye & Nissen

v. United States, 336 U. S. 613, 619 (1949); United States v. Eberhardt, 417 F. 2d 1009, 1012-1013 (4th Cir., 1969). Obviously, appellant made himself an integral and essential part of the over-all course of unlawful conduct and, in fact, encouraged the assault on Tate when contemporaneously with such assault he personally "smacked" Tate's passenger. United States v. Milby, 400 F. 2d 702, 706 (6th Cir., 1968). In short, far from being a mere bystander to an unlawful incident, as asserted, appellant was a key participant and properly held responsible as such. United States v. Eberhardt, supra.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the decisions of the District of Columbia Court of Appeals upholding the judgments of the Juvenile Court are in all respects correct and should be affirmed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

February 13, 1970